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# IRISH COMMON LAW REPORTS.

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## REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1861, 1862 AND 1863.

*Queen's Bench;*

By WILLIAM BARLOW, Esq. AND JOHN HEZLET, Esq.

*Common Pleas;*

By SAMUEL V. PEET, Esq. AND WM. B. KAYE, Esq.

*Exchequer;*

By SAMUEL WALKER, Esq.

*Exchequer Chamber;*

By WILLIAM BARLOW, Esq. SAMUEL V. PEET, Esq.  
AND SAMUEL WALKER, Esq.

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# JUDGES AND LAW OFFICERS,

*During the period of these Reports.*

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## COURT OF QUEEN'S BENCH.

*The Lord Chief Justice.*—The Right Hon. THOMAS LEFROY.

The Hon. JAMES O'BRIEN.

The Hon. EDMUND HAYES.

The Right Hon. JOHN D. FITZGERALD.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JAMES HENRY MONAHAN.

The Right Hon. NICHOLAS BALL.

The Right Hon. WILLIAM KEOGH.

The Hon. JONATHAN CHRISTIAN.

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*Lord Chief Baron.*—The Right Hon. DAVID RICHARD PIGOT.

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The Hon. HENRY GEORGE HUGHES.

The Hon. RICKARD DEASY.

## ATTORNEY-GENERAL.

The Right Hon. THOMAS O'HAGAN, Q. C.

## SOLICITOR-GENERAL.

JAMES A. LAWSON, Esq., Q. C.

## SERJEANTS.

JOHN HOWLEY, Esq., Q. C.

EDWARD SULLIVAN, Esq., Q. C.

RICHARD ARMSTRONG, Esq., Q. C.



# A T A B L E

## OF THE

### NAMES OF THE CASES REPORTED.

N.B.—*v* (*versus*) always follows the name of the Plaintiff.

Armstrong, Copland <i>v</i>	<i>App.</i> 46	Browne and others, Hughes <i>v</i>	<i>App.</i> 5
Attorney-General <i>v</i> Bagot	... 48	Bulwer, M'Donald <i>v</i> ...	... 549
B		Burke <i>v</i> Blake	... 390
Bagot, Attorney-General <i>v</i>	... 48	Burns <i>v</i> Cork and Bandon Railway	
Bartlett <i>v</i> Lewis	... <i>App.</i> 39	Company	... 543
Beausang <i>v</i> Condon	... <i>App.</i> 37	Byrne, Hogan <i>v</i>	... 166
Beere <i>v</i> Fleming and others	... 506	C	
Bell <i>v</i> Bell and others	<i>App.</i> 47	Cahill and wife <i>v</i> M'Dowall	... 481
Bennett <i>v</i> Scott	... 467	Carpenter <i>v</i> Teeling	... 525
Bergin <i>v</i> Warburton	... 137	Chamberlaine <i>v</i> Drumgoole	<i>App.</i> 1
Blake, Burke <i>v</i>	... 390	Clarke, Seymour <i>v</i>	... 537
Blood, Keller <i>v</i>	... 19	Clarke, Taylor <i>v</i>	... 571
Bloomfield <i>v</i> Johnson and another		Clinton <i>v</i> Henderson	... <i>App.</i> 43
	<i>App.</i> 57	Coleman <i>v</i> Cork and Youghal Rail-	
Bloomfield, Moohan <i>v</i>	... 86	way Company	... 368
Bristow <i>v</i> Brown	... 201	Collins <i>v</i> Thompson	... <i>App.</i> 51
Brown, Bristow <i>v</i>	... 201	Condon, Beausang <i>v</i>	... <i>App.</i> 37



## TABLE OF CASES REPORTED.

Connors v Justice and wife	... 451	Fosberry v Waterford and Limerick	
Copland v Armstrong	<i>App.</i> 46	Railway Company	... 494
Copland, Hare v	... 426	H	
Corah v Ward	<i>App.</i> 42	Hagarty v Nally	... 532
Cork and Bandon Railway Com-		Hannan, M'Areavy v	... 70
pany, Burns v	... 543	Hare v Copland	... 426
Cork and Youghal Railway Com-		Hayes v Dexter	... 22
pany, Coleman v	... 368	Henderson, Clinton v	<i>App.</i> 43
Coventry v M'Eniry	... 160	Hill, Lawrenson v	... 1
Cust, Dexter v	... 97	Hogan v Byrne	... 166
D		Horgan, Ryan v	<i>App.</i> 34
Daly, Murphy v	239, 272	Hughes v Browne and others	<i>App.</i> 5
Dexter v Cust	... 97	J	
Dexter, Hayes v	... 22	Johnson & anor., Bloomfield v	<i>App.</i> 57
Dobbyn v Somers	... 293	Justice and wife, Connors v	... 451
Donovan, M'Carthy v	... 195	Justices of County of Dublin, The	
Doolan v Doolan	... 27	Queen v	... 375
Druitt, Dumoulin v	... 213	K	
Drumgoole, Chamberlaine v	<i>App.</i> 1	Kealy v Tenant	... 394
Dublin, Justices of County of, The		Kearney v Kearney	... 314
Queen v	... 375	Keller v Blood	... 19
Dumoulin v Druitt	... 213	Kellett, Murphy v	... 488
Dunne, English v	... 562	L	
E		Lawrenson v Hill	... 1
English v Dunne	... 562	Lewis, Bartlett v	<i>App.</i> 39
Ennis, Rochfort v	... 324	M	
Eyre v M'Dowell	... 458	M'Anulty v Nantes and others	<i>App.</i> 40
F		M'Areavy v Hannan	... 70
Fitzpatrick v Pine	... 32	M'Carthy v Donovan	... 195
Fleming and others, Beere v	... 506	M'Donald v Bulwer	... 549

TABLE OF CASES REPORTED.

iii

<b>M'Donnell, O'Rorke v</b>	<i>App.</i> 8	<b>Plunket, Lord, Prendergast v</b>	... 93
<b>M'Dowall, Cahill and wife v</b>	... 481	<b>Prendergast v Lord Plunket</b>	... 93
<b>M'Dowell, Eyre v</b>	... 458	<b>Purcell, Maher v</b>	... 183
<b>M'Elroy, Moore v</b>	<i>App.</i> 49	Q	
<b>M'Eniry, Coventry v...</b>	... 160	<b>Queen, The, v Justices of Co. Dublin</b>	375
<b>M'Mullen, Madden v...</b>	... 305	<b>Queen, The, v Steele...</b>	... 398
<b>Madden v M'Mullen...</b>	... 305	R	
<b>Maher v Purcell</b>	... 133	<b>Rochfort v Ennis</b>	... 324
<b>May v May</b>	<i>App.</i> 36	<b>Ryan v Horgan</b>	<i>App.</i> 34
<b>Mercer v O'Reilly</b>	... 153	S	
<b>Middleton and Pollexfen, Mont-</b>		<b>Scott, Bennett v</b>	... 467
<b>gomery v</b>	... 173	<b>Seymour v Clarke</b>	... 537
<b>Montgomery v Middleton and Pol-</b>		<b>Small, Nelson v</b>	... 558
<b>lexfen</b>	... 173	<b>Somers, Dobbyn v</b>	... 293
<b>Moohan v Bloomfield...</b>	... 86	<b>Spaight v Twiss</b>	... 516
<b>Moore v M'Elroy</b>	<i>App.</i> 49	<b>Steele, The Queen v...</b>	... 398
<b>Murphy v Daly</b>	239, 272	<b>Stephens, O'Connor v</b>	... 63
<b>Murphy v Kellett</b>	... 488	T	
N		<b>Taylor v Clarke</b>	... 571
<b>Nagle, Tom v</b>	<i>App.</i> 38	<b>Teeling, Carpenter v...</b>	... 525
<b>Nally, Hagarty v</b>	... 532	<b>Tenant, Kealy v</b>	... 394
<b>Nantes and others, M'Anulty v</b>	<i>App.</i> 40	<b>Thompson, Collins v...</b>	<i>App.</i> 51
<b>Nelson v Small</b>	... 558	<b>Tom v Nagle</b>	<i>App.</i> 38
O		<b>Twiss, Spaight v</b>	... 516
<b>O'Connor v Stephens</b>	... 63	W	
<b>O'Reilly, Mercer v</b>	... 153	<b>Warburton, Bergin v</b>	... 137
<b>O'Rorke v M'Donnell</b>	<i>App.</i> 8	<b>Ward, Corah v</b>	<i>App.</i> 42
P		<b>Waterford and Limerick Railway</b>	
<b>Pine, Fitzpatrick v</b>	... 32	<b>Company, Fosberry v</b>	... 494



# A TABLE

## OF

### THE NAMES OF THE CASES CITED.

N.B.—*v* (*versus*) always follows the name of the Plaintiff.

Abbot and wife <i>v</i> Blofield	... 485	Armstrong, The Guardians of the	
Abbott <i>v</i> Blofield	... 482, 486	Poor of Nenagh Union <i>v</i>	35, 42,
Accidental Death Insurance Co.,			45, 133, 135
Simpson <i>v</i>	... 463	Armstrong <i>v</i> Turquand	35, 36, 37, 38,
Acton, Atkin <i>v</i>	... 454		39, 41, 42, 44, 45, 133, 135, 136
Adams <i>v</i> Andrews	... <i>App.</i> 59	Ashburner <i>v</i> Bradshaw	... 156
Advocate-General, The, Lord Sal-		Ashby, Reid <i>v</i>	... 471, 478
toun <i>v</i>	... 55	Ashby, Sharp <i>v</i>	... 574
Aitken, In re	... 370	Askwith, Lord, D'Arcy <i>v</i>	260, 269, 281
Alcock, Watson <i>v</i>	... 308	Astley <i>v</i> Johnson	... 463
Aldrich, Vigers <i>v</i>	... 539	Aston <i>v</i> Heaven	... 545
Allain <i>v</i> Chambers	... <i>App.</i> 38	Atkin <i>v</i> Acton	... 454
Allday, Lumley <i>v</i>	... 453, 455	Atkins <i>v</i> Temple	250, 252, 261, 262,
Allen <i>v</i> Dundas	... 199, 200		263, 283, 284
Allin, Newton <i>v</i>	... 155	Atkinson <i>v</i> Baynton	... 539, 542
Altham, Swinglehurst <i>v</i>	... 471	Atkinson <i>v</i> Congreve	... 492
Amherst, Earl of, Duke of Leeds <i>v</i>	102	Attorney-General, Bagot <i>v</i>	54, 57
Anderson, Kell <i>v</i>	... 180, 190	Attorney-General <i>v</i> Lloyd	... 156
Anderson, Lang <i>v</i>	... 179	Austen, Lord Waterford <i>v</i>	... 509
Anderson <i>v</i> Scott	... 396	Austrey, The Inhabitants of, The	
Andrews, Adams <i>v</i>	... <i>App.</i> 59	King <i>v</i>	... 36
Andrews <i>v</i> Eaton	... 370	Avery, Neave <i>v</i>	... <i>App.</i> 6, 7
Andrews <i>v</i> Whitehead	... 48	Aylesbury Railway Company <i>v</i>	
Anonymous	... 196, 248	Mount	... 2
Apperly, Morse <i>v</i>	... 94	Ayre <i>v</i> Craven	... 453, 456
Appleyard, Bailey <i>v</i>	... 297	Bagot <i>v</i> The Attorney-General	54, 57
Archer <i>v</i> Bennet	... 296	Bailey <i>v</i> Appleyard	... 297
Archer <i>v</i> M'Caldin	... <i>App.</i> 45	Baker <i>v</i> Jones	... 141
Armitage, Earl of Cardigan <i>v</i>	... 509	Baker <i>v</i> Ridgway	... 539, 541
Armstrong, Lessee Rennick <i>v</i>	... 64	Baker <i>v</i> Walker	... 204



Baker, Weller v ...	... 102	Birch v Stephenson ...	... 289
Baldey v Parker ...	... 396	Bird v Great Northern Railway Co.	545
Baldwins's case ...	... 534	Bird v Peagrim ...	... 483
Ballance, Stewart v ...	<i>App.</i> 37	Birkenhead, Lancashire & Cheshire Railway Co. v Brownrigg ...	2
Bank of England, Coles v	428, 429	Bishop, Hunt v ...	142, 147, 150
Bank of England, Cookson v	438, 444	Blackburn v Stupart ...	539, 541
Bank of England, Davis v ...	... 429	Blacketer v Gillett ...	... 126
Bank of England, Raphael v ...	... 449	Blake v Blake ...	168, 169
Bank of Scotland, Smith v ...	... 204	Blandford v Thackerell ...	... 62
Barker, North and South Shields Company v ...	... 126	Blay, Street v ...	... 162
Barlow v Rhodes ...	298, 301	Blofield, Abbott v ...	482, 485, 486
Barnett, Waddilove ...	<i>App.</i> 55	Blofield v Payne ...	... 102
Barrack v Newton ...	... 539	Boake v M'Cracken ...	... 162
Barret v Barret ...	... 242	Boles, Shuldharn v ...	562, 566, 569
Barrett, Graham v ...	... 179	Bolton, The Queen v ...	378, 385
Barton v Bricknell ...	... 552	Booth v Daly 326, 329, 330, 331, 332, 335, 339, 346, 347, 348, 351, 358,	367
Barton v Major ...	... 75	Bourne v Maittaire ...	... 483
Barton v Seymour ...	.. 29	Bowker, Hutcheson ...	180, 189
Bateman, White v ...	... 332	Boycott, Manley v ...	... 203
Baxendale v Great Western Rail- way Co. ...	<i>App.</i> 34	Boyle v Mulholland ...	327, 329
Baylis v Grant ...	... 573	Boyle v Olpherts ...	... 509
Baynton, Atkinson v ...	539, 542	Bradbury, Powell v ...	... 20
Beadle, Lismore v ...	... 380	Bradford v The Dublin and Kings- town Railway Co. ...	326
Beale, Skeate v ...	204, 210	Bradshaw, Ashburner v ...	... 156
Beales v Tennant ...	... 113	Brady, Coyne v ...	... 496
Beamish v Beamish ...	213, 223, 238	Braham, Planche v ...	... 428
Beard v Perry ...	<i>App.</i> 26	Brampton, Inhabitants of, Rex v ...	454
Bedwell, Townley v ...	... 58	Branston, Doe v ...	... 156
Beecher, Shepperd v ...	... 308	Brennan v Williams ...	... 14
Beere v Head ...	517, 521	Brereton v Chapman ...	... 179
Bell v Gardiner ...	... 211	Bretherton v Wood ...	... 545
Bell v Park ...	... 492	Bretts, Pickard v ...	103, 112
Bell v The Midland Railway Com- pany ...	... 128	Bricknell, Barton v ...	... 552
Bellingham v Clark ...	483, 487	Bridges, Fordyce v ...	... 565
Bennet, Archer v ...	... 296	Bright, Jones v ...	... 162
Bennett, Dye v ...	<i>App.</i> 39	Bright v Walker ...	... 509
Bennett, Page v ...	77	British Linen Company v Caledo- nian Insurance Company ...	429, 431, 442
Bergin, Stapleton v ...	... 545		
Best v Foulds ...	... 63		
Bidgood v Way ...	482, 485		

TABLE OF CASES CITED.

iii

British Museum, The Trustees of, <i>v</i> White ... .. 58	Calvert <i>v</i> Gavin ... .. 250
Brittain <i>v</i> Kinnaird ... .. 553	Calvert <i>v</i> The London Dock Com- pany ... .. 309
Brook, Wharton <i>v</i> ... .. 453	Campbell <i>v</i> White ... .. 458
Brooke, Dagleish <i>v</i> 179, 182, 184, 191	Campbell <i>v</i> Wilson ... .. 255
Brooks, Haigh <i>v</i> ... .. 204	Cane <i>v</i> Mountain ... .. 553
Brophy <i>v</i> Jones ... .. 471, 474	Capel <i>v</i> Butler ... .. 308, 312
Brown, Hellaby <i>v</i> ... .. 371	Carbery <i>v</i> Cox ... .. 168, 169
Brown <i>v</i> Johnson ... .. 179, 190	Cardigan, Earl of, <i>v</i> Armitage ... 509
Brown <i>v</i> Nichols ... .. 296	Carmichael, Creagh <i>v</i> 243, 258, 264, 288
Brown, The Collins Co. <i>v</i> ... .. 103	Carrigan <i>v</i> Mullowney ... .. 196
Brown, Tilbury <i>v</i> ... .. <i>App.</i> 53	Carroll, The Queen <i>v</i> 216, 223, 228
Browne <i>v</i> Collyer ... .. 371	Carter <i>v</i> Toussaint ... .. 896
Browne <i>v</i> Davis ... .. 162	Caslon, Catherwood <i>v</i> 216, 218, 223, 228
Browne <i>v</i> Hyde ... .. 454	Cassidy, Doe d. Kerr <i>v</i> ... .. 535
Browne, Kenney <i>v</i> ... .. 560	Cassidy, Evans <i>v</i> ... .. 168
Brownrigg, Birkenhead, Lancashire and Cheshire Railway Co. <i>v</i> ... 2	Catherwood <i>v</i> Caslon 216, 218, 223, 228
Buckley <i>v</i> Collier ... .. 485	Catterall <i>v</i> Catterall ... .. 213, 216
Buckley <i>v</i> Kiernan ... .. 545	Catterall <i>v</i> Sweetman ... .. 218
Bullock, Solme <i>v</i> ... .. 296	Caudle <i>v</i> Seymour ... .. 552
Burchet's case ... .. 485	Cave <i>v</i> Mountain ... .. 379
Burgess, Kent <i>v</i> ... .. 217	Chadwick, Morrison <i>v</i> ... .. 155
Burlington, Earl of, Doe d. Grubb <i>v</i> ... .. 242, 244	Chadwick, Mosely <i>v</i> ... .. 124
Burns <i>v</i> O'Leary ... .. 29, 31	Chambers, Allain <i>v</i> ... .. <i>App.</i> 38
Burrowes <i>v</i> Graydon... .. <i>App.</i> 56	Chambers, Fyson <i>v</i> ... .. 196
Burrowes <i>v</i> Hayes ... .. 509	Chambers <i>v</i> Wills ... .. <i>App.</i> 47
Bush <i>v</i> Curran ... .. <i>App.</i> 37	Chaplin <i>v</i> Rogers ... .. 396
Bushel <i>v</i> Wheeler ... .. 396	Chapman, Brereton <i>v</i> ... .. 179
Butler, Capel <i>v</i> ... .. 308, 312	Chapman, Jones <i>v</i> ... .. 93, 96
Byrne, Derrys and wife <i>v</i> ... .. <i>App.</i> 41	Chapman <i>v</i> Morton ... .. 161
Byrne <i>v</i> Kelly ... .. 335	Charlton, Newton <i>v</i> ... .. 204
Byrne, Montgomery <i>v</i> ... .. 330	Charrington <i>v</i> Meatheringham ... 156
Byrne, Owen <i>v</i> ... .. 429	Chatterton, Towler <i>v</i> ... .. 75, 83, 156
Cahill, Orr <i>v</i> ... .. 479	Chelmsford, Lord, Swinfen <i>v</i> ... 574
Cairncross <i>v</i> Lorimer .. .. 519	Cheshire, The Inhabitants of, The King <i>v</i> ... .. 38
Calcraft <i>v</i> West ... .. 103	Chester and Holyhead Railway Company, Grote <i>v</i> 544, 547
Caledonian Insurance Company, British Linen Company <i>v</i> 429, 431 442	Ching, Penwarden <i>v</i> ... .. 254
Callan, M'Alister <i>v</i> ... .. 471, 475, 477	Cholmondely <i>v</i> Clinton ... .. 573
Calls, Hammond <i>v</i> ... .. 545	

## TABLE OF CASES CITED.

Chorley, Regina v ...	... 519	Cork, The Justices of, The Queen v	407
Christie v Griggs ...	544, 546	Cornfoot v Fowke ...	... 204
Christie v Unwin ...	... 36	Cornill v Hudson ...	... 156
Clark, Bellingham v ...	483, 487	Costar, Harris v ...	... 545
Clark, Israel v ...	... 544	Cotterell, Sloper v ...	... 483
Clark, Ryan v ...	... 94	Courtown, Lord, v Ward	... 509
Clarke v Clement ...	... 539	Cox, Carbery v ...	168, 169
Clarke, Dixon v	<i>App.</i> 16, 17, 27, 28	Coyne v Brady ...	... 496
Clarke v Hart ...	... 462	Craven, Ayre v ...	453, 456
Clarke, In re ...	... 553	Creagh v Carmichael	243, 253, 264, 288
Clarke v Scully ...	... 545	Crickett, Mayhew v ...	... 308
Clarke, Woolley v ...	196, 198	Crofton v Sholdice ...	... 2
Clement, Clarke v ...	... 539	Crofts v Middleton ...	... 77
Clements v Lambert ...	... 297	Crofts v Waterhouse ...	... 544
Clifton, Horneby v ...	... 509	Croker, O'Driscoll v ...	<i>App.</i> 40
Clinton, Cholmondely v	... 573	Crommelin, Walker v	... 141
Clonmel, Mayor of, The Queen v...	378	Crookewit v Fletcher	... 179
Close v Phipps ..	... 204	Cross, Godfrey v ...	<i>App.</i> 34
Coape, Jarman v ...	179, 182, 192	Cross, Hogg v ...	... 535
Coggan, Martin v ...	251, 264, 285	Crosse v Seaman	<i>App.</i> 10, 18, 19, 22, 25, 27, 31
Coggins v Gibblin ...	... 479	Crystal, Maclean v	213, 216, 217, 218, 237
Colclough, Roche v ..	483 <i>App.</i> 6	Curel, Pim v ...	... 126
Coles v Bank of England	428, 429	Curran, Bush v ...	<i>App.</i> 37
Collier, Buckley v ...	... 485	Currie, Williams v ...	... 102
Collins Company, The, v Brown ..	103	Curry, Lovelace v ...	103, 112
Collins, Dorrell v ...	... 509	Cuthbertson v Irving ..	78, 545
Collins v Hungerford	103, 113	Cutter v Powell ...	... 162
Collyer, Browne v ...	... 371	Dagleish v Brooke	179, 182, 184, 191
Coltman, Newboul v	... 553	Dale, Fowler v ...	... 170
Congreve, Atkinson v	... 492	Dale, North Staffordshire Railway	
Conn, Lurting v ...	242, 243	Company v	495, 496, 498, 503
Cooch v Maltby	<i>App.</i> 10, 14, 20, 22, 25, 27	Dalrymple v Dalrymple	213, 236, 237
Cooke, Freeman v ...	... 466	Daly, Booth v	326, 329, 330, 331, 332, 335, 339, 346, 347, 348, 351, 358, 367
Cooke, Wigen v ...	471, 477	Daly, King v ...	522, 523,
Cookson v Bank of England	438, 444	D'Arcy, Lord, v Askwith	260, 269, 281
Cooper v Lawson ...	... 492	Davies v Stainbank ...	204, 205
Cooper v Pegg ...	471, 476	Davies v Williams ...	... 298
Cooper, Stokes v ...	... 156	Davis v Bank of England	... 429
Coppinger v Quirk and wife	... 483		
Corcoran, Richardson v	<i>App.</i> 59		
Corfe Mullen, The Inhabitants of,			
The King v ...	... 102		

## TABLE OF CASES CITED.

v

Davis, Browne v ...	162	Dundas, Allen v ...	199, 200
Davison v Wilson ...	36	Dunn v Di Nuovo ...	155
Dawson v Manchester, Sheffield and Lincolnshire Railway Co. ...	544	Dunn, Wilton v ...	<i>App.</i> 55
De Garcier v Lawson ...	168	Dunne, Perry v ...	471
Delany v Nolan ...	566	Dunsandle v Finney ...	<i>App.</i> 40
Denny, Southee v ...	454	Duppa v Mayo ...	152
Denton v Godfrey ...	539, 541	Durden, Moon v ...	77, 81, 83, 156
Derrys and wife v Byrne ...	<i>App.</i> 41	Durham, The Bishop of, Morice v ...	58
Dexter v Hayes ...	102, 130	Durour v Motteux ...	62
Dibbin, Hinton v ...	429	Dutt, Rogers v ...	103
Digges, Pluck v ...	75	Dye v Bennett ...	<i>App.</i> 39
Di Nuovo, Dunn v ...	155	East, Law v ...	312
Dixon v Clarke ...	<i>App.</i> 16, 17, 27, 28	East India Company, Law v ...	308
Dixon v Franks ...	492	Eastern Counties Railway Com- pany, Stokes v ...	545
Dixon v Walker ...	<i>App.</i> 11, 12, 19, 20, 22, 25, 28	Easto, Richards v ...	12, 13
Dodd, Law v ...	13	Eaton, Andrews v ...	370
Dodd, Serres v ...	482	Eaton v Lyon ...	249
Doe v Bramston ...	156	Ecclesiastical Commissioners v O'Connor ...	155
Doe v Fawcett ...	536	Edan v Dudfield ...	396
Doe v Protheroe ...	560, 561	Ede v Scott ...	492
Doe v Robinson ...	536	Edgington, Morris v ...	296, 301, 303
Doe v Turner ...	156	Edinburgh and Leith Railway Co. v Hebblewhite ...	2
Doe d. Atkinson v Fawcett ...	534	Edmonds, Sim v ...	134
Doe d. Ellis v Owens ...	57, 58	Edwards v Lawley ...	156
Doe d. Grubb v The Earl of Bur- lington ...	242, 244	Egerton, Knight v ...	103
Doe d. Kerr v Cassidy ...	535	Ellis v Kelly ...	405
Doe d. Lewis v Lewis ...	535	Ellis, Pierce v ...	492
Doe d. Phillips v Rollings ...	534	Ellis v Selby ...	170
Doe d. Smith v Henry ...	170	Ellison, Surtees v ...	322
Doe d. Williams v Protheroe ...	560	Elmore v Stone ...	396
Dorrell v Collins ...	509	Elsee v Smith ...	553
Douglas, Irons v ...	509	Emblem v Myers ...	102, 128
Doyle v Wragg ...	545	England, Bank of, Coles v ...	428, 429
Dublin and Kingstown Railway Co., Bradford v ...	326	England, Bank of, Cookson v ...	438, 444
Dublin, The Archbishop of, Trim- blestone v ...	519, 522, 523	England, Bank of, Davis v ...	429
Dudfield, Edan v ...	396	England, Bank of, Raphael v ...	449
Dudlow v Watchom ...	545	English, Hatton v ...	112
Duncan, Milnes v ...	204, 208, 209	Ennis, Rochfort v ...	333
		Errington, Rorke v ...	351, 354
		Errington v Rorke ...	326, 331, 332, 345, 349, 361



## TABLE OF CASES CITED.

Evans v Cassidy	...	168	Fuller, The Queen v...	...	378
Evans v Great Southern and West-			Fury v Smith	...	64
ern Railway Co.	<i>App.</i>	10, 29	Fussey, Rayher v	...	204
Ewart v Graham	...	509	Fynmore, Tye v	...	162
Ewart v Jones	...	565	Fyson v Chambers	...	196
Eyre v M'Dowell	...	66	Gallimore, Moss v	<i>App.</i>	55, 56
Fabrigas v Mostyn	<i>App.</i>	59	Galway v Marshall	...	453
Falkland, Lady, Strode v	...	170	Gardiner, Bell v	...	211
Fawcett, Doe v	...	536	Gardiner, Penny v	...	141
Fawcett, Doe d. Atkinson v	...	534	Gardner v Grout	...	161
Fawcett, Hesketh v	<i>App.</i>	17	Garrett v Waldron	<i>App.</i>	40
Fawcett's case	...	536	Gaskin, The King v	...	404
Fentum v Pocock	...	203	Gasson, Hemmings v...	...	453
Fenwick, Fuller v	...	371	Gates v Hudson	...	204
Fermier v Maund	...	250, 263, 284	Gavin, Calvert v	...	250
Fernie, Hodgkinson v	...	370, 371, 374	General Steam Navigation Co. v		
Fetherston, Metcalf v	...	454	Rolt	...	309
Field, Huzzy v	...	125	Geraghty, Hayden v	...	560
Finney, Dunsandle v...	<i>App.</i>	40	Gibblin, Coggins v	...	479
Fisher, Morrell v	...	327, 359, 360	Gibbon v Gibbon	...	204
Fitzhowe, Perry v	...	36	Gibbs, Goodtitle v	...	534, 535
Fitzpatrick v Pine	...	135, 137	Gibs v Price	...	454
Fitzroy, Linford v	...	553	Gibson, Mountford v...	...	196
Fitzsimons, Grand Canal Co. v	...	155, 156	Giles v Hartis	<i>App.</i>	21, 32
Fleming, Taaffe v	...	509	Gillespie, Thompson v	...	179, 190
Fletcher, Crookewit v	...	179	Gillett, Blacketer v	...	126
Flint v Pike	...	492	Gilman v Shuter	...	156
Flower's case	...	454	Gilpin v Fowler	...	492
Fordyce v Bridges	...	565	Gimson, Worthington v	...	297
Foster, Strong v	...	203, 204	Glaholm v Hayes	...	179
Foulds, Best v	...	63	Glazebrook v Woodrow	...	463
Foulds, Perrott and Green v	...	63	Gloucester, Corporation of, v Os-		
Fowke, Cornfoot v	...	204	borne	...	170
Fowler v Dale	...	170	Goddard v Ingram	<i>App.</i>	59
Fowler, Gilpin v	...	492	Godfrey v Cross	<i>App.</i>	34
Fox, Graysbrook v	...	196	Godfrey, Denton v	...	539, 541
Frank, Trepps v	...	126	Goodman v Harvey	...	449
Franks, Dixon v	...	492	Goodtitle v Gibbs	...	534, 535
Freeman v Cooke	...	466	Goold, Swanton v	<i>App.</i>	6
Freeman v Moyes	...	156	Goring v Goring	243, 251, 263, 265,	
Froggart, Sacheveral v	...	79		284, 287	
Full v Hutchins	...	379	Grady v Hunt	...	553
Fuller v Fenwick	...	371	Graham v Barrett	...	179

## TABLE OF CASES CITED.

vii

Graham, Ewart v ...	509	Hancock v Prowd ...	545
Grand Canal Co. v Fitzsimons	155, 156	Hanna, M'Areavy v ...	155
Grange, Hill v ...	296	Harding, Thompson v ...	196
Granger, Kendall v ...	61	Harford, Neilson v ...	180, 189
Grant, Baylis v ...	573	Harner, Smith v ...	480
Grant v Welchman ...	462	Harradine, Pooley v ...	204, 206
Graves, Young v ...	429	Harridge, Jevens v ...	134
Graydon, Burrowes v	<i>App.</i> 56	Harris v Costar ...	545
Graysbrook v Fox ...	196	Harris, Johnson v ...	566
Great Northern Railway Company,		Harris, Pargeter v ...	76, 78
Bird v ...	545	Harrison, Whitwell v ...	179, 192
Great Northern Railway Company,		Hart, Clarke v ...	462
Hamblin v ...	103	Hart v Lovelace ...	112
Great Southern and Western Rail-		Hartis, Giles v ...	<i>App.</i> 21, 32
way Company, Evans v	<i>App.</i> 10,	Harvey, Goodman v ...	449
	29	Hatton v English ...	112
Great Western Railway Company,		Hawkins, Somerville v ...	493
Baxendale v ...	<i>App.</i> 34	Hay, Shearwood v ..	10, 12
Great Western Railway Company,		Hayden v Geraghty ...	560
Parker v ...	210	Hayes, Burrowes v ...	509
Green v Marsden ...	534	Hayes, Dexter v ...	102, 130
Grey, Sharp v ...	544, 547, 548	Hayes, Glaholm v ...	179
Griggs, Christie v ...	544, 546	Hazell, Rex v ...	378
Grote v Chester and Holyhead Rail-		Head, Beere v ...	517, 521
way Company ...	544, 547	Heathorn, Thomas v ...	32
Grout, Gardner v ...	161	Heaton, The Lancaster and Car-	
Gubbins, Massey v ...	297, 509	lisle Railway Company v	101, 113
Guinness, Hughes v ...	<i>App.</i> 10, 21	Heaven, Aston v ...	545
Gunning v Gunning	244, 248, 250,	Hebblewhite, Edinburgh and Leith	
	252, 254, 259, 272, 280	Railway Company v ...	2
Gye, Lumley v ...	103	Hedges, Hollier v ...	<i>App.</i> 53
Hague, Tanner v ...	539	Heel, Holcroft v ...	255
Haigh v Brooks ...	204	Hellaby v Brown ...	371
Hale, Wright v ...	75, 156	Hellingly, The Inhabitants of, Re-	
Hall, Moss v ...	204	gina v ...	36
Hall, Reyner v ...	191	Hemmings v Gasson ...	453
Hamblin v The Great Northern		Henry, Doe d. Smith v ...	170
Railway Company ...	103	Hesketh v Fawcett ...	<i>App.</i> 17
Hambridge, Hilliard and wife v ...	483	Hichens, Young v ...	103
Hamilton v Nagle ...	324, 335	Hickeringill, Keeble v ...	102
Hammack v White ...	545	Hickling, The Inhabitants of, The	
Hammond v Calls ...	545	Queen v ...	35, 36
Hampton, Marriott v...	204	Higgins, Marsh v ...	77

Higgins, Shadforth v...	... 179	Hunt v Remnant	... 142, 147, 150
Hill v Grange	... 296	Hunt v Silk	... 161
Hill, Lawrenson v	2, 552, 555, 556	Hutcheson v Bowker ..	180, 189
Hill, Ross v	... 545	Hutchins, Full v	... 379
Hilliard v Leonard	... 156	Hutchinson, Lambert v	... 370
Hilliard and wife v Hambridge	... 483	Hutchinson, Shadwell v	... 102
Hinchcliffe v The Earl of Kinnoul	296, 298, 301	Hutchinson v Shepperton	... 370
Hinds, Rawson v	... 30	Hutton v Williams	... 103
Hinton v Dibbin	... 429	Huzzy v Field	... 125
Hitchcock v Way	... 82	Hyde, Browne v	... 454
Hodgens, Read v	... 169	Hyde v Watts	... 43, 134
Hodgkins v Robson	... 155	Incorporated Society, The, v Ri-	chards
Hodgkinson v Fernie...	370, 371, 374	... 55	
Hodgson v Le Bret	395, 396, 397	Ingram, Goddard v	<i>App.</i> 59
Hogg v Cross	... 535	In re Aitken	... 370
Holcroft v Heel	... 255	In re Baldwin's case	... 534
Holgate v Kay	... 156	In re Burchet's case	... 485
Hollier v Hedges	<i>App.</i> 53	In re Clarke	... 553
Holmes v Tatton	<i>App.</i> 55	In re Earl of Waterford's Claim	... 57
Holmes v Wilson	... 156	In re Fawcett's case	... 536
Homersham, Payler v	... 392	In re Flower's case	... 454
Hooper, Terry v	... 454	In re Kite and Lane's case	... 378
Hopkins, Wells v	... 463	In re Lampet's case	... 535
Hopwood, Wells v	179, 180, 189	In re Morris's Arbitration	370, 371
Horne, Wheeler v	... 321	In re Newton	... 535
Horneby v Clifton	... 509	In re Peerless	... 378
Horton v M'Murtry	... 20	In re Spencer's case	... 155
Horton v Sayer	... 372	In re Taverner's case...	... 155
How, Lucas v	... 151	In re Tyringham's case	244, 245
Howard v Hudson	462, 466	In re Van Boven's case	... 36
Howarth, Samuell v	... 203	In re Waldegrave Peerage case	215, 218, 237
Hudson, Cornill v	... 156	In re Winter's case	... 155
Hudson, Gates v	... 204	Irons v Douglas	... 509
Hudson, Howard v	462, 466	Irving, Cuthbertson v	78, 545
Hudson v Mahony	102, 107, 123	Israel v Clark	... 544
Hudson v Nicholson	... 156	Ivie, Warburton v	... 214
Huey, Skip v	... 204	Jackson v Woolley	77, 83
Hughes v Guinness	<i>App.</i> 10, 21	James, Ladbroke v	... 386
Hume, Whicker v	58, 213	James v Vane	<i>App.</i> 10, 11, 23, 24, 25, 29, 30
Hungerford, Collins v	103, 113	Janson, Lindsay v	179, 182, 184, 185, 188, 192
Hunt v Bishop	142, 147, 150		
Hunt, Grady v	... 553		

TABLE OF CASES CITED.

ix

Jarman v Coape ...	179, 182, 192	King, The, v The Inhabitants of	
Jaques v Withey ...	... 539	Corfe Mullen ...	... 102
Jefferies, The King v ...	... 103	King, The, v The Saddlers' Co. ...	404
Jeffries, Rex v ...	... 112	Kingham v Robins ...	<i>App.</i> 34
Jersey, The Earl of, Llewellyn v ...	326	Kinnaird, Brittain v ...	... 553
Jevens v Harridge ...	... 134	Kinnoul, The Earl of, Hinchcliffe v ...	296, 298, 301
Johnson, Astley v ...	... 463	Kite and Lane's case ...	... 378
Johnson, Browne v ...	179, 190	Knight v Egerton ...	... 103
Johnson v Harris ...	... 566	Knox v The Earl of Mayo ...	519, 522, 523
Johnson and wife v Lucas ...	483	Kooystra v Lucas ...	... 296
Joley v Stockley ...	253, 265, 287	Lack, Thompson v ...	77, 82
Jones, Baker v ...	... 121	Ladbroke v James ...	... 386
Jones v Bright ...	... 162	Lafone v Smith ...	<i>App.</i> 11
Jones, Brophy v ...	471, 474	Lambard, Stevenson v ...	... 155
Jones v Chapman ...	93, 96	Lambe, Tresham v ...	242, 243, 244, 247, 248, 250, 252, 258, 259, 262, 263, 265, 266, 271, 277, 279
Jones, Ewart v ...	... 565	Lambert, Clements v ...	... 297
Jones, Moggridge v ...	462, 464	Lambert v Hutchinson ...	... 370
Jukes, Rex v ...	... 38	Lampet's case ...	... 535
Kay, Holgate v ...	... 156	Lancaster and Carlisle Railway	
Kearney v Waterford and Limerick		Company v Heaton ...	101, 113
Railway Company ...	497, 502	Lang v Anderson ...	... 179
Kearney, Waterford and Limerick		Langridge, Wills v ...	10, 12
Railway Company v ...	496	Lattimore, Poulton v ...	161, 162, 164
Keeble v Hickeringill ...	... 102	Lautour v Teesdale ...	... 216
Kell v Anderson ...	180, 190	Law v Dodd ...	... 13
Kellett v Stannard ...	... 545	Law v East ...	... 312
Kelly, Byrne v ...	... 335	Law v The East India Company ..	308
Kelly, Ellis v ...	... 405	Lawley, Edwards v ...	... 156
Kelly v Solari ...	... 208	Lawrence v Wilcock ...	... 380
Kendall v Granger ...	... 61	Lawrenson v Hill ...	2, 552, 555, 556
Kenney v Browne ...	... 560	Lawson, Cooper v ...	... 492
Kent v Burgess ...	... 217	Lawson, De Garcier v ...	... 168
Kett, Parker v ...	196, 199, 200	Lawson v The Bank of London ...	103
Keyser v Scott ...	... 190	Lawton v Lawton ...	... 217
Kiernan, Ruckley v ...	483, 545	Learey v Patrick ...	... 552
Kilroy v Midland Great Western		Le Bret, Hodgson v ...	395, 396, 397
Railway Company ...	<i>App.</i> 59	Lediard, Rex v ...	... 552
King v Daly ...	522, 523	Leech v North Staffordshire Rail-	
King, The, v Gaskin ...	... 404	way Company ...	495, 498
King, The, v Jefferies ...	... 103		2 L
King, The, v The Inhabitants of			
Austrey ...	... 36		
King, The, v The Inhabitants of			
Cheshire ...	... 38		

## TABLE OF CASES CITED.

Leeds, Duke of, <i>v</i> Earl of Amherst	102	M'Alister <i>v</i> Callan	... 471, 475, 477
Lent, Mann <i>v</i>	... 462	M'Anaspie, Morrison <i>v</i>	74, 76
Leonard, Hilliard <i>v</i>	... 156	M'Areavy <i>v</i> Hanna	... 155
Leonard, M'Mahon <i>v</i>	.. 102	M'Caldin, Archer <i>v</i>	<i>App.</i> 45
Leslie <i>v</i> Richardson	... 370	M'Cracken, Boake <i>v</i>	... 162
Lessee Shuldham <i>v</i> Boles	... 566	M'Donnell <i>v</i> M'Ginty	... 509
Levin <i>v</i> Newenham	180, 182, 184, 191	M'Dowell, Eyre <i>v</i>	... 66
Lewis, Doe d. Lewis <i>v</i>	... 535	M'Dowell, O'Flaherty <i>v</i>	... 560
Lewis, Prince <i>v</i>	... 102, 125	M'Ginty, M'Donnell <i>v</i>	... 509
Lewis <i>v</i> Willis	... 326	M'Hugh and another, Martin <i>v</i>	... 483
Lindsay <i>v</i> Janson	179, 182, 184, 185, 188, 192	M'Loughlin, Parke <i>v</i>	... 77
Lindsay <i>v</i> O'Neill	... 545	M'Mahon <i>v</i> Leonard	... 102
Linford <i>v</i> Fitzroy	... 553	M'Murtry, Horton <i>v</i>	... 20
Lismore <i>v</i> Beadle	... 380	MacTaggart <i>v</i> Watson	... 308
Llewellyn <i>v</i> The Earl of Jersey	... 326	MacTaggart <i>v</i> Wilson	... 312
Lloyd, The Attorney-General <i>v</i>	... 156	Mackenzie, Neil <i>v</i>	... 155
Lloyd, Rex <i>v</i>	... 36, 552	Macklesfield, The Mayor of, <i>v</i> Pedley	... 125
Lloyd, Smith <i>v</i>	... 509	Mackreth, Wilson <i>v</i>	... 509
Lockwood <i>v</i> Wood	... 170, 171	Maclean <i>v</i> Crystal	213, 216, 217, 218, 237
London, Bank of, Lawson <i>v</i>	... 103	Madden, Seymour <i>v</i>	... 454
London Dock Company, Calvert <i>v</i>	309	Maddock <i>v</i> Mallett	... 142, 156
Lonergan, Soames <i>v</i>	... 179	Maddock, Seymour <i>v</i>	... 493
Long, Pritchard <i>v</i>	... 36	Mahony, Hudson <i>v</i>	... 102, 107, 123
Lorimer, Cairncross <i>v</i>	... 519	Maittaire, Bourne <i>v</i>	... 483
Lovelace <i>v</i> Curry	.. 103, 112	Major, Barton <i>v</i>	... 75
Lovelace, Hart <i>v</i>	... 112	Maleverer <i>v</i> Spinke	... 281
Loveland, Warburton <i>v</i>	65, 66	Mallett, Maddock <i>v</i>	... 142, 156
Low, Taylor <i>v</i>	... <i>App.</i> 37	Maltby, Cooch <i>v</i>	<i>App.</i> 10, 14, 20, 22, 25, 27
Lucan, Earl of, <i>v</i> Smith	<i>App.</i> 43, 45	Malverin <i>v</i> Spike	... 260
Lucas <i>v</i> How	... 151	Manchester, Sheffield and Lincolnshire Railway Company, Dawson <i>v</i>	... 544
Lucas, Johnson and wife <i>v</i>	... 483	Manley <i>v</i> Boycott	... 203
Lucas, Kooystra <i>v</i>	.. 296	Mann <i>v</i> Lent	... 462
Lucas <i>v</i> Peacock	... 573	Marriott <i>v</i> Hampton	... 204
Lucy <i>v</i> Mouflet	... 161, 162, 165	Marsden, Green <i>v</i>	... 534
Ludlow, Mutual Loan Fund Association <i>v</i>	... 204, 309, 312	Marsh <i>v</i> Higgins	... 77
Lumley <i>v</i> Allday	... 453, 455	Marshall, Galway <i>v</i>	.. 453
Lumley <i>v</i> Gye	... 103	Marshall, Williams <i>v</i>	... 179
Lurting <i>v</i> Conn	... 242, 243	Martin <i>v</i> Coggan	... 251, 264, 285
Lush <i>v</i> Russell	... 20, 21		
Lyall, Slocombe <i>v</i>	... 93		
Lyon, Eaton <i>v</i>	... 249		

# TABLE OF CASES CITED.

xi

<b>Martin v M'Hugh and another</b> ...	483	<b>Morrison v Chadwick</b> ...	155
<b>Martin v Strong</b> ...	492	<b>Morrison v M'Anaspie</b> ...	74, 76
<b>Martin, The Queen v...</b> ...	35	<b>Morris's Arbitration</b> ...	370, 371
<b>Martins v Upcher</b> ...	14	<b>Morse v Apperly</b> ...	94
<b>Massey v Gubbins</b> ...	297, 509	<b>Morton, Chapman v</b> ...	161
<b>Maund, Fermier v</b> ...	250, 263, 284	<b>Morton v Tibbett</b> ...	396
<b>Mayhew v Crickett</b> ...	308	<b>Mosely v Chadwick</b> ...	124
<b>Mayo, Duppa v</b> ...	152	<b>Mosely v Walker</b> ...	125
<b>Mayo, The Earl of, Knox v</b> ...	519, 522, 523	<b>Moss v Gallimore</b> ...	<i>App.</i> 55, 56
<b>Meatheringham, Charrington v</b> ...	156	<b>Moss v Hall</b> ...	204
<b>Meehelen v Wallace</b> ...	155	<b>Mostyn, Fabrigas</b> ...	<i>App.</i> 59
<b>Medical Council of England, Regina v</b> ...	404, 406	<b>Motteux, Durour v</b> ...	62
<b>Mellish v Staniforth</b> ...	179	<b>Mouflet, Lucy v</b> ...	161, 162, 165
<b>Metcalf v Fetherston</b> ...	454	<b>Mount, Aylesbury Railway Company v</b> ...	2
<b>Metcalf v Rorke</b> ...	295, 296	<b>Mountcashell v O'Neill</b> ...	101, 114
<b>Middleton, Crofts v</b> ...	77	<b>Mountford v Gibson</b> ...	196
<b>Midland Great Western Railway Co., Kilroy v</b> ...	<i>App.</i> 59	<b>Mountain, Cave v</b> ...	379, 553
<b>Midland Railway Company, Bell v</b> ...	128	<b>Moyes, Freeman v</b> ...	156
<b>Millard, The Queen v</b> ...	379	<b>Mulholland, Boyle v</b> ...	327, 329
<b>Miller, Paris v</b> ...	586	<b>Mulowney, Carrigan v</b> ...	196
<b>Miller v Salomons</b> ...	103, 113, 132	<b>Murray, Rowe v</b> ...	29, 31
<b>Millis, The Queen v</b> ...	212, 213, 216, 217, 220, 221, 223, 227, 228, 233, 234, 236, 238, 239	<b>Mutual Loan Fund Association v Ludlow</b> ...	204, 309, 312
<b>Milner, Regina v</b> ...	101, 114	<b>Myers, Emblem v</b> ...	102, 128
<b>Milnes v Duncan</b> ...	204, 208, 209	<b>Nagle, Hamilton v</b> ...	324, 335
<b>Moggridge v Jones</b> ...	462, 464	<b>Neave v Avery</b> ...	<i>App.</i> 6, 7
<b>Moir v Royal Exchange Insurance Company</b> ...	179	<b>Neil v Mackenzie</b> ...	155
<b>Monteith, Smith v</b> ...	204	<b>Neilson v Harford</b> ...	180, 189
<b>Montgomery v Byrne</b> ...	380	<b>Nenagh Union, Guardians of the Poor of, v Armstrong</b> ...	35, 42, 45, 133, 135
<b>Montgomery v Montgomery</b> ...	534	<b>Newbon, Wakefield v</b> ...	210
<b>Moon v Durden</b> ...	77, 81, 83, 156	<b>Newbould v Coltman</b> ...	553
<b>Moore v Phillips</b> ...	82, 156	<b>Newenham, Levin v</b> ...	180, 182, 184, 191
<b>Morice v Bishop of Durham</b> ...	58	<b>Newman, Woodhams v</b> ...	<i>App.</i> 19
<b>Morrell v Fisher</b> ...	327, 359, 360	<b>Newnham, Parbery v</b> ...	370
<b>Morrice, Twining v</b> ...	463	<b>Newton v Allin</b> ...	155
<b>Morris v Edgington</b> ...	296, 301, 303	<b>Newton, Barrack v</b> ...	539
<b>Morris v Morris</b> ...	242, 243, 252, 265, 286, 373	<b>Newton v Charlton</b> ...	204
		<b>Newton, In re</b> ...	535
		<b>Nichols, Brown v</b> ...	296
		<b>Nicholson, Hudson v...</b> ...	156

Nolan, Delany v ...	566	Payler v Homersham...	392
Norris, Sawyer v ...	29	Payne, Blofield v ...	102
North Staffordshire Railway Co. v		Peacock, Lucas v ...	573
Dale	495, 496, 498, 503	Peagrim, Bird v ...	483
North Staffordshire Railway Co.,		Pearson, Reynier v	179, 182, 184, 191
Leech v ...	495, 498	Pedley, The Mayor of Mackles-	
Norton, Simmons v	243, 246, 260, 269,	field v ...	125
	270, 271, 282	Peel v Tatlock	308
O'Connor, Ecclesiastical Commis-		Peerless, In re ...	378
sioners v ...	155	Pegg, Cooper v ...	471, 476
O'Driscoll v Croker ...	<i>App.</i> 40	Penny v Gardiner ...	141
O'Flaherty v M'Dowell	560	Penwarden v Ching ...	254
Okell v Smith ...	162	Perrott and Green v Foulds	63
O'Leary, Burns v ...	29, 31	Perry, Beard v ...	<i>App.</i> 26
Olpherts, Boyle v ...	509	Perry v Dunne ...	471
Omrod, Vavasour v ...	36	Perry v Fitzhowe ...	36
O'Neill, Lindsay v ...	545	Perry v Skinner ...	156, 428, 433
O'Neill, Mountcashell v	101, 114	Phillips, Moore v ...	82, 156
Orr v Cahill ...	479	Phipps, Close v ...	204
Osborne, Corporation of Gloucester v	170	Pickard v Bretts ...	103, 112
Owen v Byrne ...	429	Pickard v Sears ...	462, 463, 466
Owens, Doe d. Ellis v	57, 58	Pierce v Ellis ...	492
Owens v Roberts ...	492	Pike, Flint v ...	492
Pacifico, Tambisco v ...	<i>App.</i> 38	Pim v Curel ...	126
Page v Bennett ...	77	Pine, Fitzpatrick v ...	135, 137
Paget v Priest ...	196, 198	Planche v Braham ...	428
Parbery v Newnham ...	370	Pluck v Digges ...	75
Pargeter v Harris ...	76, 78	Plunket, Lord, Prendergast v	94
Paris v Miller ...	536	Plymouth, Countess of, v Throg-	
Park, Bell v ...	492	morton ...	155
Parke v M'Loughlin ...	77	Pocock, Fentum v ...	203
Parke, Warburton v ...	298	Pooley v Harradine ...	204, 206
Parker, Baldey v ...	396	Portington, Lady, Regina v	169
Parker v Great Western Railway		Poulton v Lattimore ...	161, 162, 164
Co. ...	210	Powell v Bradbury ...	20
Parker v Kett ...	196, 199, 200	Powell, Cutter v ...	162
Parker v Wallis ...	161, 396	Powerscourt v Powerscourt	55
Parker v Watson ...	309	Praeger v Shaw ...	492
Parker v Winlow ...	179, 190	Prendergast v Lord Plunket	94
Parkinson, Tattersall v	<i>App.</i> 34	Price, Gibs v ...	454
Patience v Townley ...	545	Pridham v Tucker ...	454
Patrick, Learey v ...	552	Priest, Paget v ...	196, 198
		Prince v Lewis ...	102, 125

## TABLE OF CASES CITED.

xiii

Pritchard v Long ...	36	Registrar Medical Council of Eng-	
Protheroe, Doe v ...	560, 561	land, The Queen v ...	415
Protheroe, Doe d. Williams v ...	560	Reid v Ashby ...	471, 478
Prowd, Hancock v ...	545	Remnant, Hunt v ...	142, 147, 150
Pugh v Robinson ...	463	Rendlesham, Tellusson v ...	169
Purday, Chappell v ...	156	Rennick, Lessee, v Armstrong ...	64
Queen, The, v Bolton ...	378, 385	Re Simson's Trusts ...	75
Queen, The, v Carroll ...	216, 223, 228	Rex v Hazell ...	378
Queen, The, v Fuller ...	378	Rex v Inhabitants of Brampton ...	454
Queen, The v Justices of Cork ...	407	Rex v Inhabitants of Welford ...	454
Queen, The, v Justices of Queen's		Rex v Jeffries ...	112
County ...	378	Rex v Jukes ...	38
Queen, The, v Martin ...	35	Rex v Lediard ...	552
Queen, The, v Mayor of Clonmel ...	378	Rex v Lloyd ...	36, 552
Queen, The, v Millard ...	379	Reyner v Hall ...	191
Queen, The, v Millis ...	212, 213, 216,	Reyner v Pearson ...	179, 182, 184, 191
217, 220, 221, 222, 223, 227, 228,		Reynolds v Wheeler ...	204
233, 234, 236, 238, 239		Rhodes, Barlow v ...	298, 301
Queen, The, v Registrar Medical		Richards v Easto ...	12, 13
Council of England ...	415	Richards, The Incorporated So-	
Queen, The, v The Inhabitants of		ciety v ...	55
Hickling ...	35, 36	Richardson v Corcoran ...	App. 59
Queen, The, v The Saddlers' Com-		Richardson, Leslie v ...	370
pany ...	20	Ridgway, Baker v ...	539, 541
Queen's County, The Justices of,		Ripley v Waterworth... ..	535
The Queen v ...	378	Roberts, Owens v ...	492
Quirk and wife, Coppinger v ...	483	Roberts v Tucker ...	427
Raleigh, Smith v ...	156	Robins, Kingham v ...	App. 34
Raphael v Bank of England ...	449	Robinson, Doe v ...	536
Rawlins v Wickham ...	204	Robinson, Pugh v ...	463
Rawson v Hinds ...	30	Robson, Hodgkins v ...	155
Rayher v Fussey ...	204	Roche v Colclough ...	483, App. 6
Read v Hodgens ...	169	Rochfort v Ennis ...	333
Ready, Simpson v ...	323	Roe d. Wilkinson v Trarmer ...	535
Reg. pros. Dinsdale v The Sad-		Rogers, Chaplin v ...	396
dlers' Co. ...	420	Rogers v Dutt ...	103
Regina v Chorley ...	519	Rollings, Doe d. Phillips v ...	534
Regina v Lady Portington ...	169	Rolt, General Steam Navigation	
Regina v Milner ...	101, 114	Company v ...	309
Regina v The Inhabitants of Hel-		Rorke, Errington v ...	326, 331, 332, 345,
lingly ...	36		349, 361
Regina v The Medical Council of		Rorke v Errington ...	351, 354
England ...	404, 406	Rorke, Metcalfe v ...	295, 296



Ross v Hill	...	545	Shadforth v Higgins	...	179
Ross, Webb v	...	553	Shadwell v Hutchinson	...	102
Rowe v Murray	...	29, 31	Shakspeare, Thomson v	...	170
Royal Exchange Insurance Com- pany, Moir v	...	179	Sharp v Ashby	...	574
Royal Exchange Insurance Com- pany, Samuel v	...	194	Sharp v Grey	...	544, 547, 548
Ruckley v Kiernan	...	483	Sharp, Wagstaffe v	...	12
Ruding v Smith	...	217	Shaw, Praeger v	...	492
Rumney v Webb	...	454	Shearwood v Hay	..	10, 12
Russell, Lush v	...	20, 21	Sheppard v Beecher	...	308
Ryan v Clark	...	94	Shepperton, Hutchinson v	...	370
Sacheveral v Froggart	...	79	Shields, North and South, Company, v Barker	...	126
Saddlers' Company, Reg. pros. Dinsdale v	...	420	Sholdice, Crofton v	...	2
Saddlers' Company, The King v	...	404	Shulldham v Boles	...	562, 566, 569
Saddlers' Company, The Queen v	...	20	Shuter, Gilman v	...	156
Sadgrave, Searles v	...	App. 27, 28	Silk, Hunt v	...	161
Salmon v Smith	...	155	Sim v Edmonds	...	134
Salomons, Miller v	...	103, 113, 132	Simmons v Norton	...	243, 246, 260, 269, 270, 271, 282
Saltoun, Lord, v The Advocate- General	...	55	Simpson v Accidental Death Insur- ance Company	..	463
Samuel v Royal Exchange Insur- ance Company	...	194	Simpson v Ready	...	323
Samuell v Howarth	...	203	Simpson, Wright v	...	311
Sawyer v Norris	...	29	Simson's Trusts, Re	...	75
Sayer, Horton v	...	372	Skeate v Beale	...	204, 210
Scholfield v Templar...	...	204	Skinner, Perry v	...	156, 428, 433
Scotland, Bank of, Smith v	...	104	Skip v Huey	...	204
Scott, Anderson v	...	396	Slocombe v Lyall	...	93
Scott, Ede v	...	492	Sloper v Catterell	...	483
Scott, Keyser v	...	190	Smith v Bank of Scotland	...	204
Scully, Clarke v	...	545	Smith, Earl of Lucan v	...	App. 43, 45
Seaman, Crosse v	...	App. 10, 18, 19, 22, 25, 27, 31	Smith, Elsee v	...	553
Searles v Sadgrave	...	App. 27, 28	Smith, Fury v	..	64
Sears, Pickard v	...	462, 463, 466	Smith v Harner	...	480
Selby, Ellis v	...	170	Smith, Lafone v	...	App. 11
Serres v Dodd	...	482	Smith v Lloyd	...	509
Seymour, Barton v	...	29	Smith v Monteith	...	204
Seymour, Caudle v	...	552	Smith, Okell v	...	162
Seymour v Madden	...	454	Smith v Raleigh	...	156
Seymour v Maddock	...	493	Smith, Ruding v	...	217
			Smith, Salmon v	...	155
			Smith v Thomas	...	493
			Smith v Thompson	...	179

## TABLE OF CASES CITED.

xv

Smith, Wallen v ...	... 471	Tatton, Holmes v ...	<i>App.</i> 55
Smith, Williams v ...	... 83	Taverner's case ...	... 155
Snell v Snell ...	... 134	Taylor v Low ...	<i>App.</i> 37
Soames v Lonergan ...	... 179	Tedd, Tunncliffe v ...	... 379
Solari, Kelly v ...	... 208	Teesdale, Lantour v ...	... 216
Solme v Bullock ...	... 296	Telluson v Rendlesham ...	... 169
Somerville v Hawkins ...	... 493	Templar, Scholfield v ...	... 204
Southee v Denny ...	... 454	Temple, Atkyns v 250, 252, 261, 262,	263, 283, 284
Spencer's case ...	... 155	Tennant, Beales v ...	... 113
Spike, Malverin v ...	... 260	Terry v Hooper ...	... 454
Spiller v Westlake ...	462, 463, 464	Thackerell, Blandford v ...	... 62
Spinke, Maleverer v ...	... 281	Thomas v Heathorn ...	... 32
Squire, Whitehall v ...	... 196	Thomas, Smith v ...	... 493
Stainbank, Davies v ...	204, 205	Thompson v Gillespie ...	179, 190
Stammers v Yearsley ...	... 36	Thompson v Harding ...	... 196
Staniforth, Mellish v ...	... 179	Thompson v Lack ...	77, 82
Stannard, Kellett v ...	... 545	Thompson, Smith v ...	... 179
Stapleton v Bergin ...	... 545	Thompson v Waithman ...	... 83
Stephenson, Birch v ...	... 289	Thomson, Shakspeare v ...	... 170
Stevenson v Lambard ...	... 155	Throgmorton, Countess of, Ply-	mouth v ...
Stevenson, Wheeler v ...	... 155	... ..	... 155
Stewart v Ballance ...	<i>App.</i> 37	Tibbett, Morton v ...	... 396
Stockley, Joley v ...	253, 265, 287	Tilbury v Brown ...	<i>App.</i> 53
Stokes v Cooper ...	... 156	Tilson, v The Warwick Gas Com-	pany ...
Stokes v Eastern Counties Railway	Company ...	... ..	... 545
... ..	... 545	Toussaint, Carter v ...	... 396
Stone, Elmore v ...	... 396	Towler v Chatterton ..	75, 83, 156
Street v Blay ...	... 162	Townley v Bedwell ..	... 58
Strode v Lady Falkland ...	... 170	Townley, Patience v ...	... 545
Strong v Foster ...	203, 204	Trarmer, Roe d. Wilkinson v ...	535
Strong, Martin v ...	... 492	Trepps v Frank ...	... 126
Stupart, Blackburn v ...	539, 541	Tresham v Lambe 242, 243, 244, 247,	248, 250, 252, 258, 259, 262, 263,
Surtees v Ellison ...	... 322	... ..	265, 266, 271, 277, 279
Swanton v Goold ...	<i>App.</i> 6	Trimblestone, The Archbishop of	Dublin v ...
Sweetman, Catterall v ...	... 218	... ..	519, 522, 523
Swinfen v Lord Chelmsford ...	... 574	Tucker, Pridham v ...	... 454
Swinglehurst v Altham ...	... 471	Tucker, Roberts v ...	... 427
Taafe v Fleming ...	... 509	Tunncliffe v Tedd ...	... 379
Tambisco v Pacifico ...	<i>App.</i> 38	Turner, Doe v ...	... 156
Tanner v Hague ...	... 539	Turquand, Armstrong v 35, 36, 37, 38,	39, 41, 42, 44, 45, 133, 135, 186
Tatham v Wright ...	513, 514		
Tatlock, Peel v ...	... 308		
Tattersall v Parkinson ...	<i>App.</i> 34		

Twining v Morrice ...	... 463	Watson v Alcock ...	... 308
Tye v Fynmore ...	... 162	Watson, Mac Taggart v ...	... 308
Tyringham's case ...	244, 245	Watson, Parker v ...	... 309
Unwin, Christie v ...	... 36	Watson v Vanderlash ...	... 454
Upcher, Martins v ...	... 14	Watts, Hyde v ...	43, 134
Van Boven's case ...	... 36	Way, Bidgood v ...	... 482
Vanderlash, Watson v ...	... 454	Way and wife, Bidgood v ...	... 485
Vane, James v <i>App.</i> 10, 11, 23, 24, 25,	29, 30	Way, Hitchcock v ...	... 82
Vavasour v Omrod ...	... 36	Webb v Ross ...	... 553
Vigers v Aldrich ...	... 539	Webb, Rumney v ...	... 454
Waddilove v Barnett... <i>App.</i> 55		Welchman, Grant v ...	... 462
Wagstaffe v Sharp ...	... 12	Welford, Inhabitants of, <i>Rex v</i> ...	... 454
Waithman v Thompson ...	... 83	Weller v Baker ...	... 102
Wakefield v Newbon... ..	... 210	Wells v Hopkins ...	... 463
Waldegrave Peerage case	215, 218, 237	Wells v Hopwood ...	179, 180, 189
Waldron, Garrett v ... <i>App.</i> 40		Wells v Watling ...	... 102
Walker, Baker v ...	... 204	West, Calcraft v ...	... 103
Walker, Bright v ...	... 509	Westlake, Spiller v ...	462, 463, 464
Walker v Crommelin... ..	... 141	Wharton v Brook ...	... 453
Walker, Dixon v <i>App.</i> 11, 12, 19, 20,	22, 25, 28	Wheeler, Bushel v ...	... 396
Walker, Mosely v ...	... 125	Wheeler v Horne ...	... 321
Wallace, Mechelen v... ..	... 155	Wheeler, Reynolds v ...	... 204
Wallen v Smith ...	... 471	Wheeler v Stevenson... ..	... 155
Wallis, Parker v ...	161, 396	Whicker v Hume ...	58, 213
Warburton v Ivie ...	... 214	White v Bateman ...	... 332
Warburton v Loveland	65, 66	White, Campbell v ...	... 453
Warburton v Parke ...	... 298	White, Hammack v ...	... 545
Ward, Lord Courtown v ...	... 509	White, The Trustees of the Bri-	
Ward v Ward ...	... 519	tish Museum v ...	... 58
Warwick Gas Company, Tilson v	545	Whitehall v Squire ...	... 196
Watchom, Dudlow v ...	... 545	Whitehead, Andrews v ...	... 48
Waterford and Limerick Railway		Whitwell v Harrison... ..	179, 192
Co. v Kearney ...	... 496	Wickham, Rawlins v ...	... 204
Waterford and Limerick Railway		Wigens v Cooke ...	471, 477
Co., Kearney v ...	497, 502	Wilcock, Lawrence v... ..	... 380
Waterford, Lord, v Austen ...	... 509	Williams, Brennan v... ..	... 14
Waterford's, Earl of, claim ...	... 57	Williams v Currie ...	... 102
Waterhouse, Crofts v ...	... 544	Williams, Davies v ...	... 298
Waterworth, Ripley v ...	... 535	Williams, Hutton v ...	... 103
Watling, Wells v ...	... 102	Williams v Marshall ...	... 179
		Williams v Smith ...	... 83
		Willis, Lewis v ...	... 326
		Wills, Chambers v ...	<i>App.</i> 47

# TABLE OF CASES CITED.

xvii

Wills v Langridge ...	10, 12	Woodhams v Newman	<i>App.</i> 19
Wilson, Campbell v ...	... 255	Woodrow, Glazebrook v	... 463
Wilson, Davison v ...	... 36	Woolley v Clarke ...	196, 198
Wilson, Holmes v ...	... 156	Woolley, Jackson v ...	77, 83
Wilson v Mackreth ...	... 509	Worthington v Gimson	... 297
Wilson, MacTaggart v	... 312	Wragg, Doyle v ...	... 545
Wilton v Dunn ...	<i>App.</i> 55	Wright v Hale ...	75, 156
Winlow, Parker v ...	179, 190	Wright v Simpson ...	... 311
Winterbottom v Wright	... 545	Wright, Tatham v ...	513, 514
Winter's case ...	... 155	Wright, Winterbottom v	... 545
Withey, Jaques v ...	... 539	Yearsley, Stammers v	... 36
Wood, Bretherton v ...	... 545	Young v Graves ...	... 429
Wood, Lockwood v ...	170, 171	Young v Hichens ...	... 103



# COMMON LAW REPORTS,

OF CASES ARGUED AND DETERMINED IN

## THE COURTS OF

### QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

### Exchequer Chamber,

AND

### COURT OF CRIMINAL APPEAL.

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Exchequer Chamber.\*

LAWRENSON v. HILL.

(Error from the Court of Exchequer).

H. T. 1861.

*Exch. Cham.*

Jan. 22.

Feb. 1.

THIS was an appeal, under the provisions of the 41st section of the Common Law Procedure Act 1856, from an order of the Court of Exchequer, allowing the cause shown, on behalf of the defendant, against a conditional order for a new trial.

The case, in the Court below, is reported, vol. 10, p. 498. The question in the case was whether, in an action against a Justice of the Peace, for acts done by him in the execution of his office, the proof of a notice of action is a necessary part of the plaintiff's case, and to be made by him, though the want of such notice be not relied upon in pleading by the defendant? The Court of Exchequer having decided that the plaintiff was, under such circumstances, bound to prove a notice of action, the plaintiff appealed from that decision.

In an action against a Justice, for acts done by him in the execution of his office, the defendant cannot, at the trial, avail himself of the provisions of the Protection of Justices Act (11 & 12 Vic., c. 16), requiring the service of a notice of action, unless the want of such notice has been relied upon in

pleading.—(LEFROY, C. J., *dissentiente*).

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\* Before LEFROY, C. J., MONAHAN, C. J., and BALL, KEOGH, O'BRIEN, CHRISTIAN, HAYES and FITZGERALD, JJ.

H. T. 1861. *J. E. Walsh and W. J. O'Driscoll*, for the appellant, the plaintiff  
*Exch. Cham.* below.  
 LAWRENSON *G. Battersby and E. P. Levinge*, for the respondent.  
*v.*  
 HILL.

In addition to the cases cited below, the following authorities were referred to: *Crofton v. Sholdice* (a); *Birkenhead, Lancashire & Cheshire Junction Railway Company v. Brownrigg* (b); *Edinburgh and Leith Railway Company v. Hebblewhite* (c); *Aylesbury Railway Company v. Mount* (d).

*Cur. ad vult.*

MONAHAN, C. J.

Feb. 1. In this case of *Lawrenson v. Hill*, we have not been able to come to an unanimous decision, my LORD CHIEF JUSTICE differing from the other Members of the Court. But we have thought it more convenient that I should deliver the judgment of the majority; and inasmuch as we have had the advantage of more than one conference amongst ourselves, the judgment which I am about to deliver will contain not merely the opinion, but I believe I may say the reasons, of the other Members of the Court, except, I regret, my LORD CHIEF JUSTICE, who will state his own views.

The action is in the ordinary form, or what would, before the abolition of the forms of action, have been the ordinary form of trespass for false imprisonment. The plaintiff, Mrs. Lawrenson, complains that the defendant assaulted her, and illegally imprisoned her; and the defendant, Mr. Hill, by his plea states in substance that he was, at the time of the committing of the grievances, a Justice of the Peace for the county of Longford; that in that capacity he attended the Petty Sessions Court, and that a charge was made against the plaintiff, which was adjudicated on by the defendant and a brother Magistrate, and that, on the evidence, the defendant believed the plaintiff had been guilty of felony; and that, in execution of his duty, he issued his warrant, under

(a) 5 Ir. Com. Law Rep. 152.

(b) 4 Exch. 426.

(c) 6 M. & W. 707.

(d) 7 Man. & G. 898.

which the plaintiff was arrested; and that he acted *bona fide* as a Justice, and within his jurisdiction. There was no replication filed to this defence; but, as the plea contained averments of several distinct matters of fact, the course taken, and, in some instances, not an inconvenient course, was this, that, instead of raising several issues, the issue settled was, whether the plea was true in substance and in fact?

H. T. 1861.  
*Exch. Cham.*  
 LAWRENSEN  
 v.  
 HILL.

At the first trial of the case, the plaintiff having proved the imprisonment, it appeared that the defendant had acted in his capacity of Magistrate; and a verdict was found for the defendant; but the Court of Exchequer set aside that verdict; and the case then went to a second trial. The point of law decided by the Court of Exchequer was that, inasmuch as the information charged the plaintiff with no indictable offence, the Magistrates had no jurisdiction to commit her for trial. The case, in that stage of it, is reported in 10 *Ir. Com. Law Rep.*, p. 177; and the propriety of that decision of the Court of Exchequer has not been questioned.

On the second trial, the plaintiff repeated her former evidence; and then, at the close of her case, an objection, not taken on the first trial, was made, that this being an action against a Justice of the Peace, and it appearing that the defendant had acted as such, the action could not be maintained, because the plaintiff had not proved, as a portion of her case, that she had given the defendant a notice of action. The plaintiff's Counsel submitted that such proof was unnecessary, and that, if the defendant intended to rely on such an objection, he should have put in some plea raising that defence. My LORD CHIEF JUSTICE was of opinion that the defendant's objection was well founded, and stated his intention of nonsuited the plaintiff; and, the plaintiff's Counsel declining to be nonsuited, he directed a verdict for the defendant; and that verdict is, that the defendant's plea is true in substance and in fact. An application was made to the Court of Exchequer to set aside that verdict, on the grounds suggested at the trial, namely, that the defence should have been specially pleaded. The case was argued before two of the learned Barons, Baron Fitz-



H. T. 1861.  
*Each. Cham.*

LAWRENSEN  
 v.  
 HILL.

gerald and Baron Hughes. They considered the case with a great deal of attention; and they concurred in the view taken by my LORD CHIEF JUSTICE, and held that, according to the true construction of the Protection of Justices Act, this matter need not be specially pleaded, and that the Common Law Procedure Act made no change in the law in that respect; and that, as the plaintiff's Counsel refused to be nonsuited, my LORD CHIEF JUSTICE was right in directing a verdict for the defendant. That is the question which we have to consider.

I need not say that, as the conclusion to which we have come is different from that arrived at by my LORD CHIEF JUSTICE, and two of the Barons of the Exchequer, we felt it due not merely to the parties, but to ourselves, to give the fullest consideration to the matter; and the decision I am about to pronounce, and the reasons upon which it is founded, are certainly the result of as mature and careful a consideration as it was in our power to give to the subject. The question really depends upon the true construction of the 12 *Vic.*, c. 16, "An Act to Protect Justices of the Peace in Ireland from Vexatious Actions for Acts done by them in the Execution of their Office;" for, although authorities were referred to in the Court of Exchequer, it appears to me that the true question is, what is the construction of that Act of Parliament? The Act, after reciting that it was expedient to protect Justices of the Peace in Ireland, in the execution of their duty, enacts, "That every action hereafter to be brought against any Justice of the Peace in Ireland, in any of her Majesty's Superior Courts of Law at Dublin, for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case, as for a *tort*; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if, at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant." The 2nd section of the Act then enacts "That, for any act done by a Justice of the Peace,

"in a matter of which by law he has not jurisdiction, or in  
 "which he shall have exceeded his jurisdiction, any person injured  
 "thereby, or by any act done under any conviction or order made,  
 "or warrant issued, by such Justice, in any such matter, may main-  
 "tain an action against such Justice, in the same form and in the  
 "same case as he might have done before the passing of the Act:"  
 that is, he may maintain a common action of trespass for false  
 imprisonment. And the statute then proceeds, by the 7th section,  
 to enact "That, in all cases where, by this Act, it is enacted that no  
 "action shall be brought under particular circumstances, if any such  
 "action shall be brought, it shall be lawful for a Judge of the Court  
 "in which the same shall be brought, upon application of the defend-  
 "ant, and upon an affidavit of facts, to set aside the proceedings in  
 "such action, with or without costs, as to him shall seem meet." No  
 question turns at present upon the construction of that section. I  
 believe it a new one, giving very peculiar powers for the protection  
 of Magistrates. But then comes the 8th section, which is as fol-  
 lows:—"And be it enacted, that no action shall be brought against  
 "any Justice of the Peace for any act done by him in the execution  
 "of his office, unless the same be commenced within six months next  
 "after the act complained of shall have been committed." I stop  
 just there; and I ask what is the true construction of that section?  
 If there were nothing else in the Act but that section, and if an  
 action of trespass were brought against a Magistrate, for an act  
 done by him in the execution of his office, and that action were not  
 brought within six months next after the act complained of, is it  
 possible to contend that that defence would be available for the  
 Magistrate, unless specially pleaded? Is it not in the terms of the  
 old Statute of Limitations, under which it has been always held  
 that, if an action were brought at a time when the action was  
 barred by the statute, that defence was not available under a defence  
 denying the commission of the offence, nor under any defence,  
 except a defence framed upon the particular statute? Then comes  
 the 9th section, "That no such action"—and I do not confine, as  
 was attempted in argument, the words "such action" to any parti-  
 cular form of action; I think it applies to every action for a thing

H. T. 1861.

*Exch. Cham.*

LAWRENSON

v.

HILL.

H. T. 1861. done by the Justice, if done in the execution of his office—"shall be  
*Exch. Cham.* "commenced against any such Justice of the Peace until one calen-  
 LAWRENSON "dar month at least after a notice in writing of such intended action  
 v. "shall have been delivered to him." Could it be argued by anyone  
 HILL. that this too was not a special defence which a defendant should  
 plead? Thus there are two matters given by way of special defence,  
 and the only two matters hitherto. The next is this:—"And be it  
 "enacted that, in every such action, brought in any of the Superior  
 "Courts of Law, the venue shall be laid in the county where the act  
 "complained of was committed." There is a direction that the venue  
 shall be laid in the proper county; and then the section goes on:—  
 "And the defendant shall be allowed to plead the general issue  
 "therein, and to give any special matter of defence, excuse or justi-  
 "fication under such plea, at the trial of such action." Now, may I  
 ask what is the meaning of that? The statute has given three sepa-  
 rate matters of special defence—one of them by the section in ques-  
 tion, and the other two by the two preceding sections. I ask, is it not  
 in terms saying that you may rely on the Statute of Limitations; you  
 may rely on the want of notice, and on the venue being wrongfully  
 laid, under a simple plea of the general issue; and you are not to be  
 put to the trouble of pleading a special plea, which you should have  
 pleaded, were not this exemption given to you by the terms of the  
 statute? But the 11th section is even more forcible, because by that  
 it is enacted "That, in every such case, after notice of action shall  
 "be so given as aforesaid, and before such action shall be com-  
 "menced, such Justice to whom such notice shall be given may  
 "tender to the party complaining, or to his attorney, such sum of  
 "money as he may think fit, as amends for the injury complained  
 "of in such notice; and, after such action shall have been com-  
 "menced, and at any time before issue joined therein, such  
 "defendant, if he have not made such tender, or, in addition to  
 "such tender, shall be at liberty to pay into Court such sum of  
 "money as he may think fit; and which said tender and payment  
 "of money into Court, or either of them, may afterwards be given  
 "in evidence by the defendant at the trial, under the general issue  
 "aforesaid." That is, that, in addition to the other several and

separate defences, the party may give in evidence, under the general issue, a tender, or payment into Court. H. T. 1861.  
*Exch. Cham.*

The 12th section immediately follows this; and the real question is, what is the construction of that section? If I am right in saying that, by the previous sections, in express terms, liberty is given to plead the general issue, and to give those matters in evidence under it, what construction should this section receive? It is as follows:—  
 “And be it enacted that if, at the trial of any such action.” What action? Any action in which the defendant shall have pleaded the general issue, or some plea putting in issue those matters of defence. Otherwise there was no necessity to enable the defendant to plead this defence, and give these matters in evidence under it. If the intention was that, no matter what defence was pleaded, those matters should be proved by the plaintiff, there was no necessity to introduce a provision enabling a defendant to plead the general issue, and to give those matters in evidence under it. “If, at the trial of any such action, the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the declaration, then, and in every such case, such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant.”

The question then is, and it was asked during the argument, what was the object of that section? It throws the onus of proof, in those cases, on the plaintiff; and he is to prove the matter, provided there is a plea upon the record requiring him to do so. If this were a matter arising for the first time, and we were called on to construe this Act as a whole, and give a consistent meaning to all its clauses, it would appear to me to follow plainly, in order to make them consistent, that the benefit given to the Magistrate is this—“You are relieved from special pleading; you may plead the general issue; and then each of those several matters must be proved by your adversary.” If I am right in saying that that is the construction of the Act, it would appear to me to decide the question, having]

LAWRENSON  
v.  
HILL.

H. T. 1861.  
*Exch. Chm.*  
 LAWRENSEN  
 v.  
 HILL.

regard, of course, to the Common Law Procedure Act, which bears strongly upon the question. The 69th section of that Act enacts that "So much of any Act of Parliament as entitles or permits any person to plead the general issue only, and to give special matter in evidence, without pleading the same, is hereby repealed, except as to pending actions: provided always, that, in any case in which a defendant, by any Act of Parliament, is now enabled to plead a plea of tender, or other matter, together with a plea of the general issue, such defendant may plead the like matter separately, or with any defence under this Act." That is, he may plead a special defence, accompanied by a tender; but he cannot, under a plea of the general issue, rely on any special defence, but must plead it specially, and apprise his adversary of the question he has to meet. The 69th section having thus, to a certain extent, abolished the general issue, the 71st section enacts that, "In actions for wrongs," as this is, for false imprisonment, "defences by way of denial shall take issue on some one, or more than one, material matter of fact alleged in the summons and plaint; and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded." It has been said that this is not a matter of "avoidance." It is not a matter of "excuse," because it does not excuse the act; nor of "justification," because it does not justify it; but it is clearly a matter of "avoidance," because it avoids the action, and is a defence to it. Look back at the section of the former Act, which gave the general issue. That section is this—"The defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse or justification, in evidence under such plea, at the trial of such action." What is the nature of "matter of defence" to an action? It is not an excuse necessarily, or a justification; but it is a matter which by law is a defence to the action. What is the common form of the plea of the Statute of Limitations? It is pleaded as matter of defence; but it is a matter of avoidance. It, therefore, appears to me only necessary to read this section, to see that the general issue having been abolished, and this section having pointed out how matter of avoidance is to be pleaded, the objection in the

present case was matter of avoidance, and, as such, should have been specially pleaded. H. T. 1861.  
*Exch. Cham.*

But we have also been referred to the 102nd section of the Common Law Procedure Act, which puts the matter, I will not say more clearly, but gives a construction to everything preceding. That section enacts that, "After defence or last subsequent pleading filed, and together with the notice of trial, the plaintiff's attorney shall furnish to the defendant's attorney a draft of the abstract of the pleadings, and of the issues in fact to be tried at Nisi Prius." Does not that necessarily imply that any matter that may be a disputed matter of fact shall have an issue framed on it, in order that the Judge may have it before him, and that the jury may inquire into it? It cannot be contended that the evidence as to the service of this notice is to be a one-sided thing. Suppose the plaintiff should prove that he had served the notice, he plainly could not be nonsuited; but suppose the defendant gets up and swears that he never was served, and that he was not in the country, the fact of service must be a matter to be investigated at the trial, and not matter of nonsuit; the jury must determine on it, and an issue must be framed on it. It would be impossible that an issue could have been settled on this matter, because the defendant had not relied on the want of notice in his defence; but if by any ingenuity it could be suggested that the defence was open to him without having pleaded it, he ought to have called on the Judge to frame an issue on it. I do not think the Judge would have had power to do so; but if the argument be right that it was raised, the proper course would have been to call on the Judge to settle an issue on it.

We have had the benefit of the reasons given by the Barons of the Exchequer for their judgment, as reported in 10 *Ir. Com. Law Rep.* p. 498. The case was argued in the Court of Exchequer very much as it was here; and it is plain that the Counsel who argued it, and the Judges who decided it, considered the case concluded by authority. The authorities are these—some cases in England which decide this, and only this, that if an action be brought by an apothecary for medicines, and the defendant plead *nunquam indebitatus* under the New Rules, or *non-assumpsit* under the old

LAWRENSON  
v.  
HILL.

H. T. 1861.  
*Exch. Cham.*  
 LAWRENSEN  
 v.  
 HILL.

law, the plaintiff will fail, unless he prove on the trial that he was in practice prior to the 5th of August 1815, or that he had obtained a certificate from the Master, Wardens and Society of Apothecaries. The first matter of consideration is the Act of Parliament which gave rise to those authorities. I have read the Act which we are considering in the present case, an Act for the protection of individuals, an Act giving them in terms a short form of plea; not obliging them to plead it, but enabling them to plead a short form of plea, putting in issue several distinct matters, and enacting that the want of all those matters shall be a ground of nonsuit. But what are the provisions of the Apothecaries Act in England, 55 G. 3, c. 194? That is an Act similar to the Act establishing our Apothecaries Hall; and its 20th section enacts "That if any person (except such as are then actually practising "as such) shall, after the said 1st day of August 1815, act or practise as an apothecary in any part of England or Wales, without "having obtained such certificate as aforesaid, every person so "offending shall, for every such offence, forfeit and pay the "sum of twenty pounds." It is an act for the protection, not of apothecaries, but of the public. And then the 21st section enacts "That no apothecary shall be allowed to recover any charges "claimed by him in any Court of Law, unless such apothecary "shall prove on the trial that he was in practice as an apothecary "prior to or on the said 1st day of August 1815, or that he has "obtained a certificate to practise as an apothecary from the said "Master, Wardens and Society of Apothecaries, as aforesaid." There is nothing there pointing out what plea is to be relied on. It is a matter in which the public are interested. It is more like an incapacity imposed upon the party—a sort of duty cast upon the Court not to allow such a charge to be recovered by an apothecary, unless he produce and prove his certificate.

The principal cases on the subject are the two cases reported together in 5 *Ad. & Ell.*, p. 383, *Shearwood v. Hay*, and *Wills v. Langridge*—both since the New Rules in England, which regulate what is to be given in evidence under a plea of *non-assumpsit* and *nil debet*. What the New Rules direct is this:—"In all actions "of *assumpsit*, except on bills of exchange and promissory notes,

the plea of *non-assumpsit* shall operate only as a denial in fact of "the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." The question in those cases arose, whether, the party having brought an action for medicines, and not having given evidence of qualification, the Sheriff was right in nonsuiting in the one case, and in the other in directing a verdict? What is the judgment of Lord Denman? He read the clauses of the Act to which I have referred, and proceeded:—"The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The Under-sheriff, in the first of the cases before us, held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative upon him to prove, and that, in the absence of such proof, he must be nonsuited. I think that the ruling was right. There is a difference between cases in which proof is made necessary by a statute, on principles of public policy, and where it is required merely for the security of individuals in transactions between themselves." I ask, respectfully, what analogy is there between that case and the present? Is the fact of the non-service of the notice, or a defence arising on it, a matter for the protection of the public? or is it not a matter for the protection of individuals in particular transactions in which they are themselves interested? It is like the non-qualification of an apothecary, which is not within the knowledge of the party dealing with that apothecary, and which is, therefore, an hardship to call on the defendant to plead. Is the defendant here ignorant whether or not he was served with this notice? Lord Denman says, "The case is quite different from that of an attorney suing without having delivered a bill. There the fact is within the knowledge of the defendant." This case comes within that reasoning of Lord Denman, and is more analogous to the case of an attorney suing without having delivered his bill, than to an apothecary suing without having obtained his certificate, the defence of non-qualification in him not being a matter within the knowledge of the defendant.

H. T. 1861.  
*Exch. Cham.*  
 LAWRENSON  
*v.*  
 HILL.



H. T. 1861.

*Esch. Cham.*

LAWRENSON

v.

HILL.

Then it is said, however, that this case, having been followed in others, has become a canon of construction, and must be followed in all cases that can by argument be brought within its principle.

That case would bind me in an apothecary's case, and no other. I doubt the propriety of the decision, but still I would follow it in a case coming within the terms of it. I am not stating my own opinion merely, for I have high authority in England for so saying; I refer to the case of *Wagstaffe v. Sharp (a)*. That case was precisely similar to the one in 5 *Ad. & Ell.* It is easy to see what the impression of the Judges was during the argument. Baron Alderson said, "You must contend that if the plaintiff's right to recover is not put in issue, as where there is a plea of accord and satisfaction, or a release, he is still bound to prove his certificate. Suppose the declaration—'A, B, who has obtained a certificate from the Master, Wardens and Society of Apothecaries'—then proceeding to set forth a claim for work and labour, and the issue were upon work and labour; is the plaintiff then to prove what is admitted, namely, that he was an apothecary?" And the Counsel was obliged to admit that, though the statement was upon the record admitted, by not pleading over, still the Judge would be bound to nonsuit. Baron Parke delivered the judgment:—"This case has been the subject of much consideration; but we have at length come to the conclusion that, as this is only a Court of co-ordinate jurisdiction, we are bound by the decision in the Court of King's Bench, in *Shearwood v. Hay*, and *Wills v. Langridge*, however great the doubt which some of the Members of this Court may feel as to the propriety of that decision."

There is no doubt that, in a Court of co-ordinate jurisdiction, these decisions are binding authorities upon that particular Act of Parliament: but the question is, are they to be extended to other cases in which the words are not substantially the same? There is a case of *Richards v. Easto (a)*, which was referred to in the argument, and by the Judges of the Exchequer. That was an action of trespass, for placing bricks, stones and building materials upon the wall and close of the plaintiff. The plea was, not

(a) 3 M. &amp; W. 521.

(b) 15 M. &amp; W. 244.

guilty by statute. The defence relied on was, that the acts complained of were done in pursuance of a particular Local Act, and that the defence under that Act was open to the defendant. The judgment was delivered by Baron Parke:—"The first question which the arbitrator refers to us is, whether the right of pleading the general issue, and giving the special matter in evidence, by the statute 14 G. 3, c. 78, is taken away by the statute 5 & 6 Vic., c. 97? We who heard the argument, my Lord Chief Baron, my Brother Platt, and myself, all agree that the right was taken away." And then he says, referring to the Apothecaries Act, that the defence there is given without reference to the form of the plea. The decision was, that the party could not give the special matter in evidence.

H. T. 1861.  
Exch. Cham.  
 LAWRENSON  
 v.  
 HILL.

A similar decision was made in *Law v. Dodd* (a).—[His Lordship stated the facts.]—One of the questions was, whether there should not have been a notice of action? The argument of Counsel was this:—"Richards v. Easto will, perhaps, be relied on as an authority to show that the objection ought to have been specially pleaded. But the words used in the 163rd section of this statute are, 'if it shall appear that such action or suit was brought before 'twenty-one days' notice was given, as before directed,' &c. Those words require the plaintiff to prove, as part of his case, that a proper notice of action was given." What is the answer of the Court? "Parke, B. That is, provided the defendant pleads the general issue by statute." Counsel then refers to the Apothecaries Act, but Baron Parke answers:—"The words of that Act are, that no apothecary shall be allowed to recover any charge, 'unless he shall prove on the trial' that he was in practice prior to the 5th of August 1815, or that he has obtained his certificate. That means without reference to the defendant's plea. *Richards v. Easto* decided that, now the general issue is taken away under statutes of a local and personal nature, the defendant cannot in such cases take advantage of the want of notice, unless he pleads it." Here, if we are right, the plea is

(a) 1 Exch. 845.

H. T. 1861. expressly given ; and the plea being given by one statute, and  
*Exch. Cham.* taken away by another, the defence should be now specially pleaded.

LAWRENSON  
 v.

HILL.

The only other case I mean to refer to is the case of *Martins v. Upcher* (a), cited by Mr. *Battersby*, and which was referred to by him as an authority that, even under the Magistrates Act, where the defendant had pleaded a plea of tender of amends, he was still entitled to rely on a defect in the notice. But in that case there was a plea of not guilty by statute, and, at the time of that plea the law was, under the old statute of *James*, that every Magistrate could plead the general issue, and give special matter in evidence under it ; and, therefore, having a plea raising the non-service of a proper notice, the Court held that it was open to the defendant, under that plea, to rely on the defect in the notice, though by a second plea he had relied on the payment of amends : but they did not decide, nor was the question raised, whether, if he had not a plea raising the defence, it would have been open to him. These cases show that the decisions on the Apothecaries Act have not been extended to other cases, arising on Acts of Parliament more like that which we are called upon to construe.

I cannot conceal from myself the fact that the conclusion to which we have come is different from that arrived at by very high authority, the Judges of the Court of Exchequer, and my LORD CHIEF JUSTICE. The knowledge that a different opinion is entertained by others may suggest the difficulty that there is something in this case which we have been unable to see ; and, but for that circumstance, I should have delivered this judgment without entertaining any doubt as to the propriety of the conclusion to which we have come. I have been informed, by my Brother FITZGERALD, that my Lord Chief Baron, at Nisi Prius, in a case of *Brennan v. Williams*, after argument, ruled in accordance with the opinion which I have just expressed.

Upon the whole, therefore, we are of opinion that the order of the Court of Exchequer must be set aside, the cause shown disallowed, and a new trial directed.

(a) 3 Q. B. 662.

LEFROY, C. J.

H. T. 1861.

Exch. Cham.

LAWRENSON

v.

BILL.

In this case, it is a great relief to me to have the authority of the judgment just now delivered, for saying that the question before us depends upon the true construction of the 12 *Vic.*, c. 16. It relieves me from the necessity of involving myself or the case in the consideration of the authorities upon the Apothecaries Acts, or the Building Acts, or some others referred to in the course of the argument. Such indeed was the inclination of my own mind; as I consider the sound principle for the construction of Acts of Parliament to be quite settled, and that we construe them most safely upon a principle applicable to every Act, namely, by having regard to the especial object, the provisions and language of each Act. I must now say that, upon a most careful and repeated consideration of this Act in all these respects, I have come to the conclusion that it has been rightly construed by the learned Judges whose judgment we are reviewing. I concur with them in that judgment, although I have not, for the reasons already stated, deemed it necessary to enter into the consideration of the several authorities by which they have sustained it. What then do we ascertain to be the great object, the provisions and language of this Act? It is entitled "An Act to Protect Justices of the Peace in Ireland from Vexatious Actions for Acts done by them in the Execution of their Office." It then proceeds:—"Whereas it is expedient to protect Justices of the Peace in Ireland, in the execution of their duty," and enacts, "That every action hereafter to be brought against any Justice of the Peace in Ireland, for any act done by him, in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case, as for a *tort*; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if, at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant." The precise question raised in this case depends rather upon the subsequent provisions of the Act than upon this section. It affords, however, clear

H. T. 1861. and distinct evidence of the great object and policy of the Act,  
*Exch. Cham.* which is further carried out by the subsequent provisions.

LAWRENSON  
 v.  
 HILL.

At the close of the plaintiff's case it was insisted, on the part of the defendant, that the plaintiff was bound to prove a notice of action, and service thereof, pursuant to the several provisions of the Act to which I am now to refer. On the other hand, it was contended, on the part of the plaintiff, that, as the want of such notice was not pleaded, it was unnecessary for the plaintiff to prove the service thereof; and this is substantially the question we have now to decide. By the 8th section it is enacted, "That no action shall be brought against any Justice of the Peace, for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed." By the 9th section it is enacted, "That no such action shall be commenced against any such Justice of the Peace, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney; in which said notice the cause of action, and the Court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party intending to sue, and also the name and place of abode or of business of the said attorney, if such notice have been served by such attorney." I pass by, for the present, the 10th section, as it is repealed, but shall consider it separately hereafter. The introductory words of the 11th section, providing for a tender of amends, are very material—"That, in every such case, after notice of action shall be so given as aforesaid, and before such action shall be commenced, such Justice may tender," &c. &c. By the 12th section it is enacted, "That if, at the trial of such action, the plaintiff shall not prove that such action was brought within the time herein limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he

“shall not prove that such cause of action arose in the county or  
 “place laid as venue in the declaration, then and in every such case  
 “such plaintiff shall be nonsuit, or the jury shall give a verdict for  
 “the defendant.”

H. T. 1861.  
*Esch. Cham.*  
 LAWRENSON  
 v.  
 HILL.

We have then these several provisions as pre-requisites to the plaintiff suing, expressed not in language affirmative and directory, “that, before action brought, the required notice shall be served,” but in language of the most prohibitory and mandatory character; first, by the 8th section, that “no action” shall be brought against any Justice of the Peace for anything done by him in the execution of his office, “unless the same be commenced within six calendar months next after the act complained of shall have been committed.” Then, again, by the 9th section, that “no such action” shall be “commenced until one calendar month at least after service of such “notice, with all the particulars, as therein required;” and, by the 12th section, “that, if the plaintiff shall fail to make such proof as “aforesaid, he shall be nonsuit, or a verdict shall be taken for the “defendant.” I confess I cannot understand how these several provisions can be dealt with in any other way than as a condition precedent to be performed on the part of the plaintiff, to entitle him to maintain his action, and of which the Court or Judge is bound to take notice, in administering the law under this Act of Parliament. But it is said that the repeal of the 10th section disentitles the defendant to this protection, either by force of this repeal, or by the Common Law Procedure Act. I will, therefore, now proceed to consider the effect and operation of this section, whilst it stood, and the effect of its repeal, as to the question before us. The words are:—“And be it enacted that, in every “such action, brought in any of the Superior Courts of Law, the “venue shall be laid in the county where the act complained of “was committed, and the defendant shall be allowed to plead the “general issue therein, and to give any special matter of defence, “excuse or justification, in evidence, under such plea, at the trial “of such action.” It is to be observed, in the first instance, that it only “allows,” but does not confine, the defendant to take advantage of any special matter of defence, excuse or justification, under

H. T. 1861.  
*Exch. Cham.*  
 LAWRENSEN  
 v.  
 HILL.

a plea of the general issue. Admitting, for the present, the non-service of the notice to be matter of defence, within the meaning of this section (of which I shall have a word to say hereafter), the only effect of the repeal of this section is to deprive the defendant of taking advantage of this defence under a plea of the general issue. There is nothing to prevent him making his defence, not by a plea of the general issue, but by a special justification, as he has now done, showing that the case is one within the 1st section of the Act, and, at the same time, requiring proof of the service of this notice. The repeal of the 10th section does not operate as a repeal of sections 8, 9 and 12, which give him a title to require it to be served previous to the action; nor do they require him to put this objection for non-service on the record in any manner. Supposing the plaintiff in this case to have framed his action in the terms prescribed by the 1st section of the Act, it must be admitted that the defendant could not now defend himself by a plea of the general issue, and could only plead, as he has done, a special justification; but there is nothing in the 1st section, or the 10th, or in any other section, to prevent him insisting, at the same time, on the benefit of the 8th, 9th and 12th sections, by which he is entitled, to require the service of this notice. With regard to this word "defence," I must say, with every respect, it appears to me to be an abuse of language to apply it in a sense which makes the non-observance of a duty imposed on the plaintiff a ground for depriving the defendant of a protection intended for his benefit. A defence also supposes an action to exist; but here it cannot exist without the previous service of this notice, according to the provisions of the statute. The result indeed of the non-service of the notice is to defeat the action, but not by way of a defence, properly so called, which is matter to be pleaded or given in evidence on the part of the defendant; but, in this instance, the matter is part of the plaintiff's duty, and, therefore, belongs to his case. The Common Law Procedure Act has been referred to, as sustaining the objection in this case. The words of the 71st section are, "In actions for wrongs, defences by way of "denial shall take issue on some one, or more than one, material

“matter of fact alleged in the summons and plaint; and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded.”

This section clearly shows what is meant by a defence, and that it refers to the matter complained of in the summons and plaint, as that which is to be denied, or confessed and avoided; but the notice in this case does not appear in the summons and plaint, nor anything about it; and, therefore, the service or non-service cannot be a matter of defence, within the meaning of this section. It is, as I said before, a matter arising on the construction of the Act, the 12 *Vic.*, c. 16, and to be decided by the Judge on the trial. This is the opinion I have formed, on full consideration; but, as the other Members of the Court have come to a different conclusion, the judgment must be reversed, and a new trial awarded.

H. T. 1861.  
*Exch. Cham.*  
 LAWRENSEN  
 v.  
 HILL.

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KELLER v. BLOOD.\*

T. T. 1861.  
 June 3, 4.

THIS was an action for the obstruction of a stream, by the raising of a weir across the river to a height much greater than its ordinary level, and so wrongfully keeping and maintaining same, whereby the water of the stream flooded the lands of the plaintiff. The defendant pleaded that he did not wrongfully keep or maintain, or does he keep or maintain, the said weir at a height much, or at all, greater than its ordinary or rightful level. An issue was framed upon that defence; and, at the trial, the defendant tendered evidence to show a right in him to keep the weir at a height greater than its ordinary level. This evidence was objected

than its ordinary level.” The issue followed the words of the defence.—*Held*, affirming a judgment of the Court of Exchequer, that the plea only put in issue the fact of the maintenance of the weir, and that evidence, on behalf of the defendant, that such maintenance was rightful, was inadmissible.

To an action for wrongfully keeping and maintaining a weir at a height beyond its ordinary level, whereby plaintiff's lands were flooded, the defendant pleaded that he “did not wrongfully keep and maintain the weir at a height greater

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\* Before LEPROY, C. J., MONAHAN, C. J., and BALL, KEOGH, O'BRIEN, HAYES and FITZGERALD, JJ.



T. T. 1861.  
*Exch. Cham.*  
 KELLER  
 v.  
 BLOOD.

to by the plaintiff's Counsel, but was received by the learned Judge. The plaintiff's Counsel excepted to this ruling; and the exception was allowed by the Court of Exchequer. Upon that judgment error was now brought. The case in the Court below is reported, *ante*, vol. 11, p. 132.

*J. E. Walsh, H. E. Chatterton and H. P. Jellett*, for the plaintiff in error.

In addition to the cases cited below, they referred to *Lush v. Russell* (a). That was an action for wrongful dismissal of a servant; and the plea was that, after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself improperly; without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause. It was held that, though the plea might be bad, yet as issue was taken upon it, the plaintiff's misconduct, as well as the fact of his dismissal, were in issue. So, in *Horton v. M'Murtry* (b), an action was brought for the same cause as in *Lush v. Russell*; and the defendant pleaded that the plaintiff did not serve the defendant faithfully. Evidence justifying the dismissal was allowed to be given under that plea. In *Powell v. Bradbury* (c), a contrary decision was made; but that case was overruled by *Lush v. Russell* and *Horton v. M'Murtry*. In the last case on the subject, *The Queen v. The Saddlers Company* (d), in the Exchequer Chamber, the authority of *Lush v. Russell* was recognised.

*W. W. Brereton and J. Collins* relied upon the arguments used in the Court below.

LEFROY, C. J.

We are unanimously of opinion that the decision of the Court of Exchequer was right. The cases that have been referred to really have no application; and, early in the argument, there occurred to me this sufficient distinction between them, that this

(a) 5 Exch. 203.

(b) 5 H. & N. 667.

(c) 7 C. B. 201.

(d) 30 Law Jour., Q. B., 186.

is an allegation of the quality of the act done, whereas, in the other cases, there were substantive matters of fact pleaded. The rule here is peremptory, that a party cannot have both a traverse and a confession and avoidance in one plea. In the present case, the defendant has pleaded a traverse, and then, under that, he seeks to give in evidence matter of confession and avoidance. The principle of the rule is obvious, to prevent parties going to trial without knowing what they were to try. The fact that the defendant did not do the act wrongfully was quite new matter. How can we collect, from the use of the words "that he did not wrongfully keep or maintain," the nature of the justification which the defendant seeks to go into?

T. T. 1861.  
*Erch. Cham.*  
 KELLER  
 v.  
 BLOOD.

O'BRIEN, J.

I shall only add a few words, as the case was tried before me. The only doubt I had was caused by the case of *Lush v. Russell*. I think, however, a distinction between that case and the present appears in this, that the averment of reasonable and probable cause there was a substantive averment of a matter of fact. There is also a distinction caused by the difference between the rules of pleading in England and under our Common Law Procedure Act. I think it very desirable that a defendant should not be allowed to give in evidence matter of confession and avoidance under a traverse. I may now refer to what took place at the trial, to show the inconvenience of admitting such evidence. When I came to charge the jury, the only question I left to them was, whether the weir had been maintained at its usual height? I was not asked to leave any question to them arising upon the use of the word "wrongfully." It is plain the evidence was pressed for the purpose of influencing the jury upon the matter of fact they had to try.

Judgment affirmed.

T. T. 1861.  
*Esch. Cham.*

### HAYES v. DEXTER.\*

June 7, 8.

Evidence of acting in a public office is evidence to go to the jury of a title to that office, as against a wrong-doer, though the title be put in issue by the pleadings, and the appointment is required to be under seal. And such evidence of acting carries with it the presumption that all formalities necessary to authorise such acting have been complied with.

An inland town, from the market of which butter is sent direct to a foreign market, is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61.

An allegation in this Court, that the verdict at the trial was upon the whole unsatisfactory, and that a new trial ought to be granted, is not a ground for disturbing the judgment of the Court below.

This was an appeal from a decision of the Court of Exchequer. The plaintiff Dexter sued as public weighmaster of butter for the town of Tipperary, and claimed damages for a disturbance of him in his office. The first defence traversed the due appointment of the plaintiff to the office. The eighth defence was, in substance, that the plaintiff was not, at any time before the commencement of the action, legally entitled to demand fees for the weighing of butter as public weighmaster, because there was no taster of butter for the town of Tipperary, pursuant to the statutes in that behalf; and that, until the butter was tasted by a taster appointed for said town, the plaintiff was not legally entitled to demand fees. To this defence a replication was filed, that plaintiff was appointed public weighmaster of butter for the town of Tipperary, after the passing of the 7 & 8 G. 4, c. 61, and that the acts of the defendant were done subsequently to the passing of that Act, and that Tipperary was not a seaport, nor a place of export from which butter was commonly shipped for exportation.

At the trial, no proof was given by the plaintiff of an appointment to the office of weighmaster, pursuant to the 52 G. 3, c. 134. It was, however, proved by the plaintiff himself, that he acted as weighmaster from 1852 up to his appointment on the 21st of October 1859. That after that date he made a difference in his charge, and on cross-examination he added that he had been appointed weighmaster on the 21st of October 1859, by twenty-one Magistrates.

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\* Before LEFROY, C. J., MONAHAN, C. J., and BALL, O'BRIEN, CHRISTIAN, HAYES and FITZGERALD, JJ.

One of the questions in the Court below, and on the appeal, was, whether there was any evidence to go to the jury of a title to the office of weighmaster, as against the defendant? The Court of Exchequer decided that there was.

T. T. 1861.  
*Exch. Cham.*  
 HAYES  
 v.  
 DEXTER.

It was also proved at the trial that butter casks, when purchased in Tipperary, were closed there, and sent direct to England.

The second question for decision was, whether the town of Tipperary was a "place of export from whence butter was commonly shipped for exportation," within the meaning of the 52 *G. 3*, c. 134, and 7 & 8 *G. 4*, c. 61? This question was, in the Court below, decided in the negative. From this ruling, the result of which was to affirm a verdict had for the plaintiff at the trial, the defendant now appealed. The case was argued by—

*J. B. Walsh* and *W. Ryan*, for the defendant, the plaintiff in error.

Serjeant *Armstrong* and *C. H. Hemphill*, for the plaintiff.

The arguments of Counsel, and the facts, are fully stated in the report of the case in the Court below, vol. 11, p. 106; and, in addition to the points there relied on for the defendant, it was now contended that the verdict was, upon the whole, unsatisfactory, and that a new trial ought to be granted.

LEFROY, C. J.

In this case, which is an appeal from a decision of the Court of Exchequer, upon a point saved at the trial, the action was brought by the weighmaster of Tipperary for a disturbance of his office. The pleadings and issues resulted in three questions, which have been argued before us. At the trial, the learned Judge directed the jury to find a verdict against the plaintiff upon one of the issues, viz., whether the town of Tipperary was a seaport, or place of export of butter, within the meaning of the statutes in that behalf? reserving power to the plaintiff to move to change that verdict into a verdict for him. The other points, with respect to the

T. T. 1861.  
*Exch. Cham.*

HAYES  
 v.

DEXTER.

disturbance of the plaintiff's office, and his title to the office, were left to the jury, and they found a verdict for the plaintiff. Part of the application to the Court of Exchequer was, to set aside that verdict. That Court having, according to the reservation of the Judge, entered a verdict for the plaintiff upon the issue as to which he had given a direction, and having refused to set aside the verdict found by the jury upon the other issues, judgment was upon the whole given for the plaintiff.

The appeal from that decision raises three questions; first, whether there was any evidence to go to the jury of a title in the plaintiff to the office? secondly, whether Tipperary is a place of export of butter, within the meaning of the Acts of Parliament? and, thirdly, it was suggested to us that though, strictly speaking, we might think the Court below had done right, yet, upon the whole, enough appeared to show that the verdict was unsatisfactory, and that we should now direct a new trial. That is not a ground upon which we can be called to review the judgment. There is no criterion by which to ascertain the grounds upon which a verdict can be said to be more satisfactory to one tribunal than another. Upon that point, therefore, we are of opinion that there is no pretence for questioning the judgment of the Court below.

We are also of opinion that the Court of Exchequer decided rightly upon the point, whether there was any evidence to go to the jury of title to the office of weighmaster. We think there was substantial evidence upon that subject. There was the evidence of his having acted in the office of weighmaster after his appointment. It is quite clear that his acting antecedently to that appointment cannot be called in aid to support his title under the appointment; but although it cannot be called in aid to support his title, the question is, whether his having acted as an usurper carries with it the consequences which are imputed to it by the argument of the defendant's Counsel, and which amounts to this, that he is disqualified by it from giving *prima facie* evidence of his title, from acts done after he was appointed? There is no authority for such a proposition, and none was cited. *Prima facie* evidence is suffi-

cient to support an appointment, until it is displaced by proof of some defect. T. T. 1861.  
Exch. Cham.

HAYES  
v.  
DEXTER.

In this case the *prima facie* evidence is of two sorts—there is, first, the acting in the discharge of the duties of the office; and I take it to be quite settled that this alone would be sufficient; and there is the evidence of the plaintiff himself, of the fact of an appointment, in October 1859, by twenty-one Magistrates, the body by which an appointment in that town was to be made. The fact, therefore, that an appointment did take place by the body competent to make it, is in evidence; and there is the further evidence of that appointment having been recognised and acquiesced in by the public, from this remarkable fact, that acts of disturbance, which occurred while he was an usurper, ceased from the time at which this appointment is stated to have been made. The principle upon which the acts of a public officer, discharging the duties of the office, are *prima facie* evidence of his appointment, is this, that it is not to be presumed that acquiescence by the public would be given against their own interest; and it is the strongest evidence of acquiescence, that there was opposition to the party while he acted as an usurper, and that that opposition was afterwards withdrawn. There is this further evidence, of a no less striking character, that before his actual appointment there is evidence of his having taken a certain amount beyond the legal fee, and that after his appointment there is no instance of his having continued to ask more than his legal fee. With respect to the requirements of the statutes, as to the giving of security and the taking of the oaths, I consider it to be clear law that, if a party has got satisfactory evidence, unimpeached by conflicting evidence, of his acting in the office, that is evidence of an appointment in fact, and *prima facie* is evidence of a legal appointment. If he continues so to act, it will be presumed that he has performed the requisites without which he would not be entitled to act.

That disposes of the question whether there was sufficient evidence to go to the jury to support the plaintiff's title, and

T. T. 1861.  
*Exch. Cham.*

HAYES  
v.

DEXTER.

brings the case to the last question, whether he has forfeited his right, by the want of a taster of butter? The necessity for that appointment depends upon the other issue, whether Tipperary was a place of export of butter? Upon a consideration of all the Acts of Parliament, particularly the 52 G. 3, c. 134, and the 7 & 8 G. 4, c. 61, we are of opinion that the term "place of export" has received a statutable exposition in the sense put upon it by the Court of Exchequer, and that the verdict upon that issue was rightly entered for the plaintiff.

Upon the whole, we are of opinion that the judgment of the Court below must be affirmed.

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T. T. 1861.  
*Exchequer.*

## DOOLAN v. DOOLAN.\*

(*Exchequer*).

May 23.

WRIT of revivor, to revive a judgment "whereby Nicholas Doolan, "of, &c., on the 8th of February 1848, in the Court of Exchequer, "recovered against Thomas Doolan, of, &c., the sum of £256. 14s. "debt, besides £11. 13s. 5d. costs, making together £268. 7s. 5d.; "and of which sum the said Nicholas Doolan alleges that there "remains due and unsatisfied the said sum of £268. 7s. 5d., together "with interest thereon, at the rate of £4 per cent. per annum, from "the 8th of February 1850: therefore the said Thomas Doolan is "hereby required to appear in the said Court, within eight days "after the service hereof, and show cause wherefore execution "should not be had accordingly; or in default thereof the said "Nicholas Doolan may proceed to execution for the said sum of "£268. 7s. 5d., with interest thereon, and his costs."

Plea.—"That the said plaintiff should not have execution against "him the defendant, because he says that, after the recovery of the "said judgment, the plaintiff, for having satisfaction thereof, caused "to be issued out of the said Court of Exchequer, on the 2nd "of May 1848, a writ of *capias ad satisfaciendum*, directed to "the Sheriff of the county of the city of Dublin, whereby the "said Sheriff was commanded to take the defendant, and him "safely keep, so that the said Sheriff should have the body of the "defendant before the Barons of the Exchequer, at the Queen's "Courts, Dublin, to satisfy the plaintiff a certain debt of £256. "14s., which the said plaintiff had recovered in the said Court, "before the said Barons, against him; as also the sum of £11. "13s. 5d., which in the said Court was duly adjudged to the

Plea to a writ of revivor, praying execution generally, that the plaintiff, after the recovery of the judgment mentioned in the writ, had issued a *ca. sa.* on foot of it, upon which the defendant had been arrested, and detained in custody until he was discharged under an order from the plaintiff.—*Held*, upon the authority of *Burns v. O'Leary* (3 Ir. Com. Law Rep. 1), that this plea disclosed no answer to the plaintiff's writ.

\* Before FITZGERALD, HUGHES and DEASY, BB.



T. T. 1861. *Exchequer.*  
 DOOLAN  
 v.  
 DOOLAN. "said plaintiff for his damages and costs, occasioned by the delaying  
 "of that debt; and by virtue thereof, he the said Sheriff, afterwards,  
 "and before this suit, duly took the defendant in execution, and had  
 "and kept him in his custody to satisfy the plaintiff in the said  
 "action, until afterwards, to wit, on the 3rd day of July 1848; upon  
 "which day the said Sheriff discharged the defendant from his cus-  
 "tody, by virtue of an order from the said plaintiff for that purpose:  
 "and defendant avers that the said debt and costs for which the  
 "plaintiff caused the defendant to be so arrested and taken in  
 "execution, as aforesaid, and from which the plaintiff so discharged  
 "the defendant, as aforesaid, are the same debt and costs, amounting  
 "to the sum of £268. 7s. 5d., mentioned in the said writ of revivor,  
 "and in respect of which the plaintiff now seeks to revive the said  
 "judgment, and to have execution in the same: wherefore the  
 "defendant says the plaintiff ought not to have execution as  
 "aforesaid."

Demurrer to this defence; upon the ground that the fact that the plaintiff caused the defendant to be taken into custody under a writ of *ca. sa.*, issued on foot of the judgment sought to be revived, does not amount to a discharge of the debt and costs secured by the said judgment; and inasmuch as said taking into custody, and discharge therefrom, does not affect the right of the plaintiff to issue writs of execution against the lands or goods of the defendant.

*P. J. McKenna*, in support of the demurrer.

This defence is bad, upon principle and authority. The writ of revivor prays a general execution, and the defence, as an answer to the plaintiff's right to that general execution, relies upon the fact of the plaintiff having arrested the defendant under a *ca. sa.* That defence in England would be a discharge of this debt; but in this country that effect is excluded by the 31st section of the 35 G. 3, c. 30 (*Ir.*), which enacts, "That every  
 "person who shall have charged or detained his or her debtor,  
 "on a *capias ad satisfaciendum*, or otherwise, shall have the  
 "same execution for the same debt against the lands or goods

“or other estate of his or her said debtor, by *elegit, fieri facias*, T. T. 1861.  
 “or otherwise, as if the said creditor had not so imprisoned, *Exchequer.*  
 “or charged, or detained, his or her said debtor in prison; DOOLAN  
 “any law, practice or usage to the contrary notwithstanding.” v.  
 The remedy, therefore, against the lands and goods of the debtor DOOLAN.  
 remains intact; and this plea, which is pleaded in bar to our  
 general demand of execution, cannot be sustained. There is also  
 an express decision upon the point. In *Burns v. O’Leary (a)*,  
 a *scire facias* prayed a general execution, and a defence was put  
 in, almost identical with that in the present case, which the Court  
 of Queen’s Bench held to be bad. Crampton, J., in the argument  
 puts the case in this way—“Your difficulty seems to be that you  
 “do not answer the entire charge contained in the *scire facias*.  
 “Your answer is, that under the *ca. sa.* the execution is discharged;  
 “but that admits that the judgment is still in force, and admits the  
 “plaintiff’s right to execution by a *fi. fa.*” Those observations  
 exactly apply to the present case. *Rowe v. Murray (b)* is a decision  
 to the same effect. It may be contended, upon the other side, that  
 the plaintiff should have issued a special writ of revivor, or that he  
 should have replied specially, admitting the plea, and praying execu-  
 tion against the lands and goods; but this argument was pressed in  
*Burns v. O’Leary*.

*D. C. Heron and Edward Johnson, contra.*

The plaintiff by his writ prays a general execution. The defence,  
 which is admitted by the demurrer, shows that he is not entitled to  
 that; yet, if there were to go a general judgment, a *ca. sa.* might  
 issue again. The plaintiff should have prayed for the proper judg-  
 ment, which was for a special execution against the lands and  
 goods: *Barton v. Seymour (c)*. In *Sawyer v. Norris (d)*, it has  
 been decided that a judgment creditor, by arresting his debtor,  
 forfeits the benefit of the charge conferred upon him by the 3 & 4  
*Vic.*, c. 105. The 25th section of that Act is by analogy an  
 answer to the plaintiff’s demand of execution. *Burns v. O’Leary*

(a) 3 Ir. Com. Law Rep. 1.

(b) 1 H. & B. 296.

(c) 1 H. & B. 304 n.

(d) 7 Ir. Chan. Rep. 314.

T. T. 1861.

*Exchequer.*

DOOLAN

v.

DOOLAN.

was plainly decided upon special demurrer, although the report states it to have been upon general demurrer.—[HUGHES, B. The plaintiff, by his writ of revivor, claims a right to three kinds of execution. Your plea is, that he has no right to a *ca. sa.*, and you plead that in bar to his demand for execution generally, though your plea only covers one of the three kinds of execution sought.—FITZGERALD, B. Before the 35 *G.* 3, c. 30, this would have been a good plea; and the question is, whether, as that statute does not take away all protection from the defendant, the plea does not remain the same as before; and it lies upon the plaintiff to bring himself within the statute.]—The cases upon the Insolvent Acts show that that course should have been taken, and a replication filed, admitting the plea, and praying judgment against the lands and goods only. A general plea has been held sufficient in those cases: *Rawson v. Hinds* (a).

*Cur. ad. vult.*


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 FITZGERALD, B.

May 25.

This was a proceeding by writ of revivor, to have execution on a judgment obtained by the plaintiff against the defendant, on the 8th of February 1848, for the sum of £256. 14s. 0d. debt, and £11. 3s. 5d. costs. The defendant pleaded, in bar of execution, that the plaintiff, after the recovery of the judgment, and on the 2nd of May 1848, issued a writ of *capias ad satisfaciendum* on the judgment, by virtue of which he the defendant was taken in execution, and was kept in custody until the 3rd of July 1848, on which day he was discharged from custody, by virtue of an order from the plaintiff for that purpose; and he avers that the debt and costs for which he was so arrested and taken in execution, and from which the plaintiff so discharged him, are the same debt and costs mentioned in the writ of revivor.

To this defence the plaintiff has demurred. But for the Irish statute 35 *G.* 3, c. 30, the facts stated in the defence would doubtless constitute a sufficient bar to the writ of revivor; but the 31st section of that statute enacts, that "Every person who shall have

(a) 1 H. &amp; B. 599.

“charged or detained his or her debtor on a *capias ad satisfaciendum*, or otherwise, shall have the same execution for the same debt against the lands or goods or other estate of his or her debtor, by *elegit*, *fieri facias* or otherwise, as if the said creditor had not so imprisoned, charged or detained his or her said debtor in prison; any law, practice or usage to the contrary notwithstanding.” This section of an Act, in some other respects merely temporary, has been held to be perpetual. The facts stated in the defence, therefore, though sufficient to bar any execution against the person of the defendant, do not constitute any bar to an execution or executions against his estate; and the objection now made to the defence is, that it is pleaded to the whole writ of revivor, and in bar of any execution thereby sought, and not of execution against the person only.

In answer to this it was urged, on the part of the defendant, first, that the writ of revivor ought to have been special, founded on the particular facts, and confined to the executions preserved by the statute.

Secondly; that the plaintiff ought to have replied, admitting the facts stated in the defence, and seeking the limited execution only. And it was further urged, thirdly, that the objection could not be taken on general demurrer.

The question whether the writ of revivor ought to have been special, in such a state of facts, was raised, but not decided, in the case of *Rowe v. Murray* (a). However, in the subsequent case of *Burns v. O'Leary* (b), a defence undistinguishable from the present was held bad on demurrer, on the ground that it ought to have been pleaded in bar of the execution against the person only; and it was considered that the objection that the writ of revivor ought to have been special was not sustainable. It appears also, from the report, that the attention of the Court was drawn to what was also relied on here, viz., by the form of pleading in *sci. fa.*, sanctioned in this country, in cases under the Insolvent Acts, a general defence of discharge under those Acts, replied to by an admission of the facts, and a prayer of execution against lands only, but without success. Unless

T. T. 1861.  
*Exchequer.*  
 DOOLAN  
 v.  
 DOOLAN.

(a) 1 H. & B. 296.

(b) 3 Ir. Com. Law Rep. 1.

T. T. 1861. *we are prepared to overrule this decision, it must rule the present*  
*Eschequer.* case. It was said, indeed, and this turns out to be the fact, that the  
 DOOLAN demurrer in that case, though stated by the report to be general,  
 v. was special. But the case of *Thomas v. Heathorn* (a) shows that  
 DOOLAN. the objection that a pleading purporting to cover the whole of the  
 declaration, answering part only, may be taken on general demurrer.  
 However we may think the more convenient course would be the  
 issuing of a special writ, founded on the facts and the statute of G. 3,  
 or that the plaintiff should be put to rely on the Statute Law in his  
 replication, we are not prepared to overrule a decision which does not  
 seem to be in direct conflict with any other, which might here be  
 the subject of a writ of error, and is the decision of a Court of  
 co-ordinate jurisdiction. The demurrer must, therefore, be allowed;  
 but the defendant may amend, on payment of costs.

(a) 2 B. & C. 417.

### FITZPATRICK v. PINE.\*

June 3, 12.

Where a party in pleading sets out partially, and relies on, a document not under seal, the Court may, under sections 63 & 64 of the Common Law Procedure Act (1853), treat such document as if set out in pleading *in extenso*, and give judgment upon it accordingly.—[FITZGERALD, B., *dissentiente*.]

THIS was an action of trespass to real property. The first paragraph complained that the defendant broke and entered certain lands of the plaintiff, called Springfort, in the county of Tipperary, and dug

*Per* FITZGERALD, B.—This rule only applies to documents of which *oyer* was demandable before the Common Law Procedure Act.

An order of Justices, authorising a road contractor to enter the lands of a third party, and take stones, under the 162nd section of 6 & 7 W. 4, c. 116, was in the following terms:—"Under the provisions of the Grand Jury Acts, 6 & 7 W. 4, c. 116, s. 162, I hereby authorise and empower M. O'B., road contractor, to enter on the lands of S., in the possession of E. F., for the purpose of quarrying and carrying away materials for the repair and maintenance of 400 perches of the road from Nenagh to Limerick, between the barony bounds at T., and the barony bounds at

\* Before PIGOT, C. B., and FITZGERALD and DEASY, BB.

up, excavated and undermined the said land, and with his servants, &c., trampled upon, damaged and injured the soil and surface thereof, and caused the said surface thereof to fall in, and broke the locks and gates of the plaintiff, upon said lands, and placed upon the said land of the plaintiff, and kept thereon, for a long time, a large quantity of stones.

T. T. 1861.  
*Exchequer.*  
 FITZPATRICK  
 v.  
 PINE.

The second paragraph complained of a trespass to the same land, by quarrying stones therein.

The third paragraph was for a conversion of a quantity of stones, the property of the plaintiff.

Defence.—That before, &c., one Michael O'Brien had a contract for repairing a certain road, running from Nenagh to Limerick; and that the said Michael O'Brien, under the provisions of an Act of Parliament passed in a Session held in the sixth and seventh years of his late Majesty King William the Fourth, obtained an order from certain Justices of the Peace of the county of Tipperary, having authority in that behalf, to enter the lands in summons and plaint mentioned, being situate in said county, and within the jurisdiction and the scope of the authority of said Justices, in that behalf, for the purpose of quarrying and carrying away materials for the repair and maintenance of said portion of said road, hereinbefore mentioned; and defendant says, that said alleged trespasses and grievances were done by the defendant in quarrying away materials for such repair and maintenance of said portion of road, by the directions of said Michael O'Brien, and under and in exercise of said authority.

Demurrer to this defence.—Because it does not appear, in or by said defence, that the defendant was the servant or bailiff of the said Michael O'Brien, or that the defendant committed the said alleged trespass and grievances in pursuance or fulfilment of any

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D., in the barony of Upper Ormond and county of Tipperary; and we name J. Q., M. O'B. and M. S. arbitrators as to damage.

“ Given under my hand, at Nenagh Petty Sessions, this 14th day of July 1860.

“ R. G. } Justices of the Peace,  
 “ W. O. } County Tipperary.”

*Held*, that this order was bad, no jurisdiction of the Justices to make it appearing upon the face of the order.

T. T. 1861.  
*Exchequer.*  
 FITZPATRICK  
 v.  
 PINE.

duty owing by the defendant to the said Michael O'Brien; and because that, for anything that appears in and by the said defence, the lands in said defence mentioned may have been a deer-park, bleach-green, orchard, walled garden, haggard, yard or planted walk, lawn or avenue to a mansion-house; and because that the order in said defence mentioned, a copy of which has been furnished by the defendant to the plaintiff, in pursuance of the 64th section of the Common Law Procedure Act (Ireland) 1853, and which is in the words and figures following—"Under the provisions of the Grand Jury Act 6 & 7 W. 4, c. 116, s. 162, I hereby "authorise and empower Michael O'Brien, road contractor, to enter "on the lands of Springfort, in the possession of Edward Flinn, for "the purpose of quarrying and carrying away materials for the "repair and maintenance of 400 perches of the road from Nenagh "to Limerick, between the barony bounds at Tullyheady and the "barony bounds at Derry, in the barony of Upper Ormond and "county of Tipperary; and we name James Quinn, Michael O'Brien "and Michael Scanlan arbitrators as to the damage.

"Given under my hand, at Nenagh Petty Sessions, this 14th  
 "day of July 1860.

"R. GASON } Justices of the Peace,  
 "WILLIAM OSBORNE } Co. Tipperary"—

is bad and of no effect; inasmuch as it does not appear, in or by said order, that said Justices, or either of them, had jurisdiction to make said order, or that it was proved to the satisfaction of said Justices, or either of them, that the gravel, stones or other materials sought could not be conveniently procured elsewhere: and because it does not appear, in and by said order, that the lands therein mentioned are not a deer-park, &c.; and because said order is bad, for excess in naming arbitrators as therein; and it does not appear that the road in said fourth defence was such a road as said Justices could lawfully make such order in respect of; and that the said defence affords no answer to that part of the said writ of summons and plaint which complains that the defendant placed upon the lands of the plaintiff, and kept thereon for a long time, a large quantity of stones; nor to the part of said plaint which complains that defendant broke the locks and gates of the plaintiff, though said

defence is pleaded as a defence to to all the causes of said action, T. T. 1861.  
in said writ.

*Eschequer.*  
FITZPATRICK  
v.  
PINE.

*H. Devitt* (with him Serjeant *Armstrong*), in support of the demurrer.

First; this order of the Justices is properly before the Court: *Armstrong v. Turquand* (a), and *The Guardians of the Poor of the Nenagh Union v. Armstrong*, there cited. Secondly; the order is bad, and shows no jurisdiction upon the face of it. It purports to be made under the 162nd section of the Grand Jury Act, 6 & 7 W. 4, c. 116, which enacts, "That every County Surveyor, and "every contractor for any work to be executed by grand jury "presentment, shall have power and authority to dig for, raise and "carry away, in or out of any lands, not being a deer-park, bleach- "green, orchard, walled garden, haggard or yard, or planted walk, "lawn or avenue to a mansion-house, any gravel, stones, sand or "other materials, whether the same be found in the same or any "adjoining county, which may be wanted for the building, re- "building, enlarging or repairing any bridge, arch, gullet, pipe "or wall, or for the making, repairing or preserving any road "or footpath," making satisfaction for damage, as prescribed by the section; "provided, nevertheless, that it shall not be lawful "for any such contractor or surveyor to enter any such lands "for any such purpose, against the will of the occupiers thereof, "without the previous order of a Justice of the Peace; which "order any such Justice is hereby authorised and required to grant, "on its being proved to his satisfaction that the gravel, stones or "other materials sought cannot be conveniently procured else- "where." The order should find the facts required by that section, and contain an adjudication upon them. Further, it should have negatived the exceptions mentioned in the section. Again, there is nothing to show that the lands upon which the entry was made were in Tipperary at all. The plea, at all events, should have negatived the exceptions in the section, if the order did not. He cited *The Queen v. Martin* (b); *The Queen v. The Inhabitants of*

(a) 9 Ir. Com. Law Rep. 32.

(b) 2 Q. B. 1037 n.



T. T. 1861. *Hickling* (a); *Perry v. Fitzhewe* (b); *Van Boven's case* (c); *Davidson v. Wilson* (d); *Stammers v. Yearsley* (e); *Regnia v. The Inhabitants of Hellingly* (f); *The King v. The Inhabitants of Austrey* (g); *Christie v. Unwin* (h); *Pritchard v. Long* (i); *Vava-sour v. Omrod* (k).

*Exchequer.*  
FITEPATRICK  
v.  
PINE.

*W. Ryan and J. E. Walsh, contra.*

The cases which have been cited are cases on convictions, which are criminal records, and different from the document here relied on, which is an order. The Court will intend that everything in an order has been done regularly: 1 *Wms. Saund.*, p. 313. *Rex v. Lloyd* (l) decided that the evidence on which an order is founded need not be set out. But, further, we submit that the Court has no power to look outside the defence, and that the order itself is not before the Court. *Armstrong v. Turquand* (m) was a case in which a deed was referred to in a pleading; and it was held that the Court, under sections 63 and 64 of the Common Law Procedure Act 1853, was at liberty to look at the deed. That rule is only true in respect of deeds of which *oyer* was demandable before the Common Law Procedure Act, and has no application to documents such as this order is. The 63rd section of the Common Law Procedure Act 1853 enacts, that "It shall not be necessary for any party, in his "summons and plaint, or defence or other pleading, to set forth "more of any deed or document than such parts thereof as are "material to his action or defence, or to the purport and effect "thereof; and it shall not be necessary to make profert of any "deed or document, and, if profert be made, it shall not entitle "a party to crave *oyer* of, or to set out upon *oyer*, such deed or "other document." Before this Act, if a party, in the case of a deed, omitted to state in pleading any portion material to his

(a) 7 Q. B. 880.

(c) 9 Q. B. 669.

(e) 10 Bing. 35.

(g) 6 M. & S. 319.

(i) 9 M. & W. 666.

(l) 2 Str. 996.

(b) 8 Q. B. 757.

(d) 11 Q. B. 890.

(f) 5 Jur., N. S., 626.

(h) 11 Ad. & Ell. 373.

(k) 6 B. & C. 430.

(m) 9 Ir. Com. Law Rep. 32.

adversary, *oyer* should be craved, and the deed set out upon the record by the opposite party, which made the deed a part of the pleading of the party who relied on it. But the law was different as to documents of which *oyer* was not demandable. The opposite party should plead that the instrument contained such and such provisions, setting them forth, and the document became a portion of his own pleading. There is no provision in the Irish Act corresponding to the 56th section of the English Common Law Procedure Act, 15 & 16 *Vic.*, c. 76, enabling a party in the case of all instruments to answer in pleading by setting out the material portions, making them a part of his own pleading. As this cannot be done in the case of deeds, it follows that there is still a distinction here between deeds of which *oyer* was demandable, and documents of which *oyer* was not demandable. The 64th section enacts that, "When any party shall rely on any deed or document, or any portion thereof, in his pleading, the said deed or document shall be produced upon every trial and argument in the cause, unless its non-production can be satisfactorily excused; and in default thereof it shall be lawful for the Court or Judge before whom such trial or argument shall be had, to exclude the said party so in default from all benefit or advantage of the said deed or document." The prior section having done away with the demand of *oyer*, and the practice of setting out a deed on *oyer*, the 64th section substitutes the production of the deed, which has been held to give to the opposite party the same rights as he would have had by craving *oyer*: *Armstrong v. Turquand*; but in the case of deeds of which *oyer* was not demandable, the benefit, if omitted, could only have been obtained by setting them out in pleading, which might have been done before as well as since the Common Law Procedure Act; and there is, therefore, no ground for inferring that the production of *such* a document can enable a party to make a use of it which could not have been made before the Common Law Procedure Act.

Serjeant *Armstrong*, in reply.

The provisions of the 64th section, which are applicable to "any

T. T. 1861.

*Exchequer.*

*FITZPATRICK*

*v.*

*PINE.*

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 PINE.

deed or document," were intended as a substitution for the 56th section of the English Common Law Procedure Act; and the object of the Legislature was, that a party should have, by the production of the instrument, every benefit which he could derive by pleading it. The object was to shorten pleadings. "Deeds" and "documents" are, by the 64th section, put upon the same footing; and, therefore, *Armstrong v. Turquand* is expressly in point.

As to the other point he cited *Rex v. Jukes (a)*; *The King v. The Inhabitants of Cheshire (b)*.

*Cur. ad. vult.*

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Their Lordships, differing in opinion, delivered judgment *seriatim*.

DEASY, B.

June 12.

This was an action of trespass. The defence was founded on an order of Justices, made under the 162nd section of the 6 & 7 W. 4, c. 116. The demurrer sets out the order *in extenso*. It was argued, first, that we are at liberty to look at the order; secondly, that the order is bad. No difficulty arises as to the latter point. No adjudication of the Justices, such as is required by the 162nd section of the Grand Jury Act, appears upon the face of the order. The difficulty arises on the first question. As this is not a deed, it is said the Court cannot incorporate it with the pleadings. The 63rd section of the Common Law Procedure Act 1853 enables a party to set out so much of any deed or document as is material to his action or defence, and abolishes the necessity of proferret. The 64th section requires the production of any deed or document relied on, on every argument and trial. The question is, as to the effect of the latter section. It is contended that, as a document could not, before the Common Law Procedure Act, have ever been incorporated in pleading, it cannot now. In *Armstrong v. Turquand (c)*, it was decided that, on the argument of a demurrer to a replication, in an action on a policy of insurance, where the ques-

(a) 8 T. R. 542.

(b) 5 B. & Ad. 439.

(c) 9 Ir. Com. Law Rep. 32.

tion turned on the construction of the policy, the Court could look at the policy, and decide on the terms of it, and not on the statement in the pleadings. That case followed a decision in this Court, unreported. It is distinguishable from this case, as being the case of a deed, and capable of having been set out on *oyer*. I do not think the Court intended so to confine it. At page 41 of the report of *Armstrong v. Turquand*, I find this passage in the judgment:—"It was, at all events, good sense to recommend it. It enables the Court to dispose of the rights of the suitors, founding their judgments on facts as they exist, and not as they are fancied by an ingenious pleader. It is not attended with any practical inconvenience, as it will merely render it necessary that pleaders should look at documents themselves, and not be contented with the statements of them in their adversary's pleading." I think the reasons there stated equally apply to this case. I think the decision involves this, that the effect of the sections of the Common Law Procedure Act is that whenever, on argument, a question arises as to the effect or construction of a deed or document referred to in a pleading, the Court can refer to the original, and give its judgment according to its opinion on that original, and not according to the statement of it in the pleading. All the arguments founded on convenience equally apply to the case of a document as to the case of a deed; and, as it has been once decided in the case of a deed, I think we are justified in applying the same rule to the case of a document.

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 PINE.

FITZGERALD, B.

On one of the points of this case, I have the misfortune to differ from the other Members of the Court. While I agree that, if we are entitled to treat the Justices' order, produced on the argument, as forming *in extenso* a part of the defence, the demurrer ought to be allowed, I am of opinion that we cannot so treat it. The question turns on the 63rd and 64th sections of the Common Law Procedure Act 1853. The 63rd section is this—[His Lordship read it]—The first sentence seems to make no alteration in the law. But, as the law was before, a party relying on a certain

T. T. 1861.

*Eschequer.*

FITZPATRICK

v.

FINE.

class of documents in his pleading, though he was not bound to state more thereof than was material to his case, was bound to make profert of, and (on *oyer* craved by the opposite party) to produce the document. Then the opposite party could set out on the record the whole as a part of the pleading of the party relying on it. The section does away with the necessity of profert; and it takes away the right of *oyer*, and also of setting out the whole of the document on the record. It does not, however (in terms at least), take away the right, supposing the document could be shown to the Court, of treating it as a part of the pleading of him who relies on it.

It is further to be observed that, with respect to deeds of which *oyer* was demandable, if the party pleading omitted any part material to his adversary, the *only* mode of taking advantage of this was by craving *oyer*, and making the instrument a part of the pleading of him who relied on it; the adversary could not plead that the deed contained the provision omitted. The law was otherwise, however, as to instruments of which *oyer* was not demandable, when relied on in pleading, and but partially stated. The opposite party, relying on something omitted, could not make the whole instrument a part of his adversary's pleading; but he could answer that the instrument contained the omitted provisions, and set them forth. Of some documents, of which profert was not necessary, the Courts were in the habit of enforcing production, for the purpose of trial or argument, though by no means of all. The English Common Law Procedure Act (15 & 16 Vic., c. 76, s. 56) contains a similar provision with ours, as to profert and *oyer*. But, by the 56th section, it proceeds to enable the party against whom any deed or document is pleaded to answer, in pleading, by setting out such parts of the instrument as he considers material, making, however, what he sets out a part of his own, and not of his adversary's pleading. The English Act, therefore, as to the matter of pleading, puts deeds of which *oyer* was before demandable, and documents of which *oyer* was not demandable, when pleaded respectively, on the same footing as the latter were before the statute. Of neither can *oyer* now be demanded; neither can, by being set

out, be made part of the pleading of him who relies on them; but to both omitted parts may be pleaded in answer. The Irish Act contains no such provision. The plain effect of this appears to me to be that, as to the matter of pleading, there is still necessarily a distinction in this country between deeds of which *oyer* was demandable before the statute, and documents of which *oyer* was not demandable. With reference to the first, you cannot now, any more than you could before the statute, plead in answer omitted portions, making them a part of your own pleading. With reference to the latter, you *can* do this, just as you could before the statute; and it is every day's practice so to do. But the Irish statute does contain a provision to which there is no corresponding provision in the English. The 64th section is this—[His Lordship read it.]—This section, I agree, applies to both classes of documents. It alters the law as to both. The production of deeds of which *oyer* was demandable before the statute is now enforced without craving *oyer*. The production of all other documents relied on in pleading is now enforced; and the power of doing so is not limited to any particular class. The section, though it states the consequences of default in producing the documents, is silent as to the use to be made of them on production. That being so, I confess I know of no right that we have to give them any use, on production, unknown to the law before the statute. As to deeds of which *oyer* was demandable, when produced on *oyer*, you could set them out on the record, and, when so set out, treat them as part of your adversary's pleading. The law forbids the demand of *oyer*—it forbids the setting out on the record; but it does not in terms say they shall not, when produced, be treated as part of the adversary's pleading. On the other hand, it does not enable you, in the case of *such* documents, to plead material parts omitted. In this state of things, the Court of Common Pleas, and not unreasonably, as I think, held, in the case of *Armstrong v. Turquand* (a), that such use as was before made might be made of them on production on the argument of a demurrer—they might be treated as part of the pleading of the party who

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 PINE.

(a) 9 Ir. Com. Law Rep. 32.

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 PINE.

relied on them. But I can see nothing in the Act, by inference or otherwise, to enable us to make this use of documents of which *oyer* was not demandable before the Act, and of which this use was unknown to the law, and as to which still in this country the practice is that, if parts are omitted by the party pleading, you may answer by setting out the whole, or such parts as you consider material, but making it part of your own pleading. It seems to me wholly anomalous to say that, with respect to such documents, you may do both; that is to say, either by compelling the production of the documents under it, as set out *in extenso* by your adversary, or plead the whole of it as part of your own pleading. I think, therefore, we cannot treat the Justices' order in this case as part of the defendant's plea; and, that being so, I think the demurrer ought to be overruled.

PIGOT, C. B.

The cases of *Armstrong v. Turquand* (a), and *The Guardians of the Poor of the Nenagh Union v. Armstrong*, in this Court (which is not reported, but which is correctly cited in the judgment in *Armstrong v. Turquand*), establish that, if the document in question in this case were a deed, the Court would use it "on the argument," and act on it for the purpose of decision. The words of the 64th section are:—"Where the party shall rely on any "deed *or document*, or any portion thereof, in his pleading, the "said deed or document shall be produced upon every trial and "argument in the cause, unless its production can be satisfactorily "excused." There is nothing in the section which distinguishes a deed from any other document; and, upon the frame of this section alone, I think every other document relied on in the pleading must be dealt with in the same manner as a deed.

One main object of the Common Law Procedure Act, as disclosed in its provisions, was to abridge pleadings, not only by diminishing their length (ss. 10, 16, 76), but also by lessening their number. The plan of framing issues upon defences alone, without replications, showed this to be one of the purposes of

(a) *Ubi supra.*

the Act; and it appears still more plainly, if possible, by the 48th section, which prohibits any pleading, subsequent to the defence, without the leave of the Court. The abolition of the practice of craving *oyer* of a deed, and then setting it forth for the purpose of demurring, was in furtherance of the same object: and it appears to me that this purpose of the statute would be very considerably contravened by our holding that the 64th section did not apply the same rule to other documents as to deeds. It is, as to them, rather more necessary, with a view to the preventing of prolixity, than it is as to deeds. When, according to the old practice, *oyer* was craved, and the deed was set forth on *oyer*, the party setting it forth made it part of his adversary's pleading, and was thus enabled to take the opinion of the Court upon its construction by a demurrer, without any further pleading. But where a defendant in his plea pleaded an instrument which was not a deed, or pleaded a deed, with an excuse for not making profert, as was done in *Hyde v. Watts* (a), the only course for the plaintiff was, to set forth the instrument in his replication; and then the defendant was obliged, in order to take the opinion of the Court, to demur. But, further, the plaintiff, in such a case, might set forth certain parts only of the instrument, namely, those on which he relied as explaining or qualifying the portion set forth by the defendant; and it might be necessary then for the defendant to put in a rejoinder, setting forth the entire. This is a course of proceeding wholly foreign to the plan of procedure contemplated by the Legislature in the Common Law Procedure Act, according to which there can be no pleading subsequent to a defence, without "special leave" of the Court or a Judge, obtained on application for that purpose. It seems very improbable that the Legislature would have imposed that restriction if it contemplated the necessity of so setting forth instruments in alternate pleadings; and they must be so set forth, in order to allow parties to present their cases properly to the Court, unless we give to the 64th section, as to all documents, the construction which, in the two cases already referred to, was given to it as to deeds. A comparison between the English

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 PINE.

(a) 12 M. & W. 254.



T. T. 1861. *Common Law Procedure Act*, which was passed in 1852, with the *Irish Common Law Procedure Act*, which was passed in 1853, will tend to the same conclusion. I quite concur in the observations made by the Lord Chief Justice of the Common Pleas, in *Armstrong v. Turquand (a)*, on the provisions of these two statutes, passed by the Legislature *in pari materia*. I may observe, in addition, that not only does the 63rd section of the Irish statute contain a provision which, in a part of it, follows in terms those of the 55th section of the English Act (showing that the Legislature had before them that section in framing the Irish enactment), and not only is there, in the English Act, nothing analogous (as to the matter now before us) to this provision of the 64th section of the Irish statute, but the Irish statute altogether omits the 56th section of the English Act. That section provides, "That a party pleading in answer to "any pleading, in which any document is mentioned or referred to, "shall be at liberty to set out the whole, or such part thereof as "may be material; and the matter so set out shall be deemed and "taken to be part of the pleading in which it is set out." The omission of any such provision in the Irish statute appears to me very plainly to indicate that the Legislature did not contemplate any such pleading, and that they considered that they sufficiently provided for the proper use of the deed or document, wherever it should be necessary to show its contents to the Court, by enforcing its production "upon every argument." And this inference of their intention is greatly fortified by the 48th section, before referred to, which prohibits, generally, any further pleading, after the defence, without leave of the Court. If they contemplated the setting forth, in a subsequent pleading, of the document relied on in the pleading next preceding, I think it not probable that they would have omitted to provide, by some such provision as the 56th section of the English statute, that a party whose adversary referred to a document in support of his pleading should be freed from the restriction imposed by the 48th section of the Irish Act, and be at liberty to answer his adversary, by setting forth the whole document, or the material parts of it.

(a) 9 Ir. Com. Law Rep. 39.

I have stated that, if this were the case of a deed, I should consider myself, sitting in this Court, as bound by the decisions to which I have referred. Even if I were not so bound, I should not, on re-consideration, dissent from those authorities. The construction of the Act is certainly not free from difficulties. As one whose habits of thought and practice were at one period much directed to the business of pleading, I might, perhaps, incur some risk of being among those who (as intimated by the Lord Chief Justice, in *Armstrong v. Turquand*) are liable to be startled at such an innovation on all the old rules of pleading as those decisions seem to involve. But I own I feel anything but regret at the unriveting of the fetters which those rules imposed upon suitors in their pursuit of justice; and I am more than content to resign myself to some seeming anomaly, in order to prevent the re-imposition of those fetters in new forms. *Oyer* is abolished; so ought the setting out of deeds *in extenso*. Where a party refers to a deed in his pleading, and produces it to the Court, and to the opposite party, and when that party desires the opinion of the Court upon the question whether the deed supports the case of the party who relies on it, nothing more is required for decision than the pleading and the deed. No further or better information, with a view to forming a judgment, can be acquired by the Court from the ceremony of first setting forth the substance of a deed in a pleading, written out on paper or on parchment, and then, in order to raise a question as to its true import, setting forth a copy of the deed, written on another piece of parchment or paper, the contents being compared with the contents of the instrument set forth. A shorter, simpler, cheaper and equally effectual course is, to treat every pleading in which a party relies on a deed or instrument as incorporating all its provisions; to oblige the party relying on it to produce it; and then to take his pleading and his deed, as if they contained together one connected statement. And this I understand to be, in effect, the substantial matter decided, as to a deed, in *The Guardians of the Poor of the Nenagh Union v. Armstrong*, and in *Armstrong v. Turquand*. No inconvenience appears to exist in this course, more than in the course adopted in the case of bills

T. T. 1861.

Eschequer.

FITZPATRICK

v.

PINE.

T. T. 1861.  
*Eschequer.*  
 FITZPATRICK  
 v.  
 FINE.

of exceptions under the 121st section, and the form No. 6, schedule (B) of the Irish Common Law Procedure Act; according to which, by consent of the parties, or by order of the Judge, any deed or document may be incorporated, by reference, in a bill of exceptions, "without setting forth the same." The rights of the parties may altogether depend upon the terms of a document so referred to, as well as upon the terms of a document stated in the pleadings and brought before the Court upon a demurrer. Upon a motion for a new trial (especially in an ejectment on the title), the most important rights are often determined upon documents not mentioned at all in the pleadings; and in each of these cases the question may be presented, by writ of error, or now by appeal, to the highest Court of appellate jurisdiction. If we once free our minds from notions which our professional habits are calculated to engraft upon them, drawn from the long established system of pleading which required every document, or portion of a document, material for decision on demurrer, to be set out on the record, we shall find that there is nothing in the nature of a demurrer which ought to prevent the Court looking outside the record. And this may be done without offending otherwise than in form, or rather in appearance, the old and favored maxim that the Court cannot "travel out of the record." To reconcile this part of our procedure with that rule, we may apply another well-known maxim, *verba relata inesse videntur*, which may serve to remove even that objection. The document relied on being treated as part of the pleading (as it may be a part of a bill of exceptions), the whole is before the parties and the Court, for argument and for decision.

Nor is this so great and so anomalous an innovation as may be, at the first view, supposed. It is, in effect, only recurring to what was done before pleadings were written, when special pleading had not yet become half science, half art; when a party relying upon a deed came with it into Court, making profert by producing it before the Judges; when, at the instance of his adversaries, it was read, and then demurred to; and when the Court, on having it read, and hearing the demurrer, decided between the parties. The allegations and the document were taken down by the officer of the Court; and

were then recorded. The history of this ancient practice was given by Serjeant *Stephen*, in the first chapter of the former editions of his work *on Pleading*. Under the 48th section of the Common Law Procedure Act, the Court, or its officer, may authenticate the document by an official mark or indorsement, which, like the signature or initials of the Judge's Registrar at a trial, may show to an Appellate Court the "deed or document" on which the judgment was pronounced by the Court of original jurisdiction.

T. T. 1861.

*Eschequer.*

WIZPATRICK

v.

PINE.

For these reasons, I am of opinion that we are at liberty, in this case, to look at the order of the Magistrates relied on in the defence demurred to. And so holding, and looking at that order, I am very clearly of opinion that it gave no authority to do the acts which are complained of in this action, and as to which it is relied on as a justification. It is unnecessary to refer to the authorities which were cited in the argument. They establish, that an order of Magistrates, as well as a conviction, must show, upon the face of it, that the Magistrates who made it did so in the exercise of lawful authority, within their jurisdiction. This order does not show, what was essential to give the Magistrates authority to make it, under the 162nd section of the Grand Jury Act (5 & 6 W. 4, c. 116), that it was proved to their satisfaction that the stones or materials to be quarried and carried away from the premises mentioned in the order could not be conveniently procured elsewhere. That omission alone is sufficient to vitiate the order. I may observe that it is not stated in the order—nor even averred in the plea, that Michael O'Brien, the party who obtained the order, had a contract for a road, under the Act of Parliament. Whether the fact that he had such a contract may or may not be so inferred or understood, from some of the general expressions contained in the defence, whether or not the defence itself is defective in the want of substantial averments to constitute an answer to the plaint, it is not necessary to inquire, since the order cannot sustain the pleading. I prefer resting my judgment on this latter ground. At the same time, I wish not to be understood as considering the defence in other respects sufficient. It may be that, on examining it closely, its defects may amount merely to a want of certainty. Lord Ellenborough

T. T. 1861.  
*Exchequer.*  
 FITZPATRICK  
 v.  
 PINE.

once said, of a pleading framed in terms of similar vagueness and generality:—"Neither is it necessary to draw the line, and say how "little information a declaration may give to the Court, of the real "contract between the parties; how nearly it may be reduced *ad "maciem et ossa"* (a). It may be, that this defence, in the other parts of it, if the order were sufficient, might be sustainable on demurrer, though it might also be considered so vague and uncertain that, on a motion, it must be set aside. As to this, I only wish to guard myself against giving any sort of approval or sanction to a mode of pleading in which the skill and ingenuity of the draftsman appear to have been taxed, in giving the least possible information to the party who is to answer, or to the Court which is to decide.

(a) *Andrews v. Whitehead* (13 East., 116).

M. T. 1861.  
 Nov. 7, 18.

#### ATTORNEY-GENERAL v. BAGOT.\*

A bequest of personalty in a will, so given as, by analogy to the statute 43 Eliz., c. 4 (*Eng.*), to be a valid charitable bequest, is a legacy for a

INFORMATION by the Attorney-General, in Equity, as follows:—  
 First.—The object of this information is to obtain payment of the duty which has become payable to Her Majesty, in respect of certain legacies which were bequeathed by the will of George Archibald "purpose merely charitable," within the meaning of the 38th section of the 5 & 6 Vic., c. 82, and is exempt from legacy duty.

A testator directed a sum of £2000 to be disposed of by his executors to such charitable purposes, or for the promotion of art and industry in Ireland, in such manner and portion as his executors should, in their discretion, think most advisable. This having been held, in a suit to administer the testator's assets, a valid charitable bequest, a scheme was settled, by which the executors applied the fund for the establishment of a perpetual endowment for the encouragement of students of the Fine Arts in Ireland.

*Held*, that this was a legacy for a "purpose merely charitable," within the 38th section of the 5 & 6 Vic., c. 82.

\* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

Taylor, deceased, and of which will the defendants are executors and trustees. M. T. 1861.  
Eschequer.

ATTORNEY-  
GENERAL  
v.  
BAGOT.

Secondly.—The testator was, at the time of making his will, and of his death, entitled to certain real and personal property in Ireland, and had power to dispose of the same by his will; and on the 30th day of June 1854, the testator made his last will, of that date, duly executed, and thereby devised and bequeathed the said property to the defendants, upon the trusts thereafter mentioned, and thereby constituted the defendants executors. And the testator, by his said will, desired, among other things, that out of the residue of his said property, his said executors should retain, in priority to any other bequest thereafter made, a sum of £2000, to be disposed of by his said executors in such manner as he might by any codicil to his said will direct; and in default of any such direction by him, to be disposed of by his said executors, to such charitable purposes, or for the promotion of art and industry in Ireland, in such manner and portions as his said executors should in their discretion think most advisable. And the testator also, by his said will, bequeathed his pictures, if not disposed of by codicil, to the Royal Irish Institution, meaning the institution that was to have the use of the money collected under the Dargan tribute, as giving them the use of a building for exhibiting works tending to encourage the promotion of Irish art; and in case the said institution should not be carried out, the testator, by his said will, bequeathed said pictures to such other institution for the exhibition of Irish art and industry as his said executors should select, or for them to use in such manner as they might deem fit.

Thirdly.—The testator never made any codicil to his said will, and died on the 2nd day of October 1854, without having altered or revoked same; and, on the 23rd day of November 1854, probate was duly granted to the said defendants, who thereupon entered into possession of the said property.

Fourthly.—There remained in the hands of the defendants, after satisfying all prior claims, a sufficient residue of the said property of the testator to satisfy the said legacy of £2000.

Fifthly.—The defendants, on or about the 1st day of March 1858,

**M. T. 1861.** Exchequer.  
**ATTORNEY-GENERAL**  
**v.**  
**BAGOT.**

were called upon by the Legacy-duty office to pass their residuary account, with reference to the said will; and accordingly they did prepare the same, and their solicitor attended, for the purpose of passing it, at the Legacy-duty office in Dublin, on or about the 30th day of March 1860, when it was vouched by the proper officer, subject to the objection of the Comptroller of Legacy-duties, who objected, among other things, that the said legacy of £2000, and also the said legacy of the pictures, were liable to a duty of £10 per cent. on the value thereof.

Sixthly.—On or about the 26th day of June 1856, a cause petition was exhibited in the Court of Chancery in Ireland, wherein the defendants, as such executors as aforesaid, were petitioners, and the Right Hon. the Attorney-General for Ireland, and others, were respondents; in the course of the proceedings upon which said cause petition, the Counsel for the petitioner applied to Master Litton (to whom the said cause petition was referred for his report) for his direction as to the payment of the said duties claimed by the Legacy-duty office: whereupon it was ordered and declared, by the said Master Litton, on the 12th day of May 1860, that said legacies of £2000, and said pictures, were good charitable bequests, and not liable or subject to any legacy-duty; and the said petitioners were, at the same time, ordered by the said Master not to pay said legacy-duty, and were, at the same time, authorised by the said Master to defend any action or other proceedings taken to enforce payment of the said legacy-duty; and it was ordered at the same time, by the said Master, that a copy of the order he then made should be served on the official of the Legacy-duty office in Dublin.

Seventhly.—The said cause petition was presented, and the said proceedings were had before, and the said order was pronounced by, the said Master Litton, without any notice having been served upon the Commissioners of Inland Revenue, or their solicitor in Ireland, or anyone acting for them or him, and without their cognizance of the said proceedings, although the management of the duties upon legacies, and the enforcement of the payment thereof, is by law vested in the said Commissioners; and the

said Attorney-General was a party to the said cause only with reference to the validity or invalidity of the said legacies, and not with reference to the liability to duty of the said legacies (supposing them to be valid), under the particular provisions of the Acts regulating legacy-duties.

M. T. 1861.  
Eschequer.  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

Eighthly.—After the pronouncing of the said order, the defendants did appropriate the said legacy of £2000 to purposes which were not merely charitable; that is to say, they disposed of the same, in obedience to the directions of testator (according to the option which he had given them), for the promotion of art and industry in Ireland; which disposition of the said legacy, the defendants, in their discretion, thought more advisable than the disposition of same to charitable purposes: and the said disposition was made by their giving the said legacy of £2000 for the establishment of a perpetual endowment for the encouragement of students of the Fine Arts, by virtue of which certain prizes and scholarships were instituted, to be open to all students of the Fine Arts who should have attended for two years, at least, a school of art in Ireland or elsewhere; provided that, in the latter case, they should be of Irish birth: and certain pictures of the testator also came into possession of the defendants, as such trustees and executors, and they disposed of the same in the manner directed by the said will.

Ninthly.—By virtue of the Legacy-duty Acts in Ireland, there was and is payable to her Majesty, in respect of the said legacy of £2000, and also in respect of the said legacy of the pictures of the testator, a duty at the rate of £10 per cent., upon the value of the said legacies, and the defendants ought to have paid the same.

And the information, after interrogating as to the matters therein stated, prayed a declaration that the defendants were chargeable, as such trustees and executors, with a duty at the rate of £10 per cent., or at some other rate, in respect of the said several legacies thereinbefore set forth; and that the particulars of the residue of the property of the testator, which had come to the hands of the defendants, and the particular purposes to which the said £2000 and the said pictures were applied, and the amount of duty payable



**M. T. 1861.** in respect of the said legacies, might be ascertained, and that the  
*Eschequer.* defendants might be decreed to pay the duty.

**ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.**

The defendants, Charles E. Bagot and Charles Leech, filed their joint and several answer, admitting the will and the death of the testator, as stated in the information; also that the £2000 was available, and that a cause petition was filed for the administration of testator's assets, and that the Attorney-General was made a party thereto; and further stated that, on the 12th and 18th of February 1858, the validity of the bequests, as good charitable bequests, was fully argued before the Master, in presence of Counsel for the Attorney-General and Counsel for the residuary legatees; and that the Master, on the 15th of February 1858, gave his judgment, pronouncing the bequests valid charitable bequests, and, by his final order of the 19th of February 1858, directed the defendants to prepare a scheme for carrying out testator's intentions, and to have the same submitted for his approval.

That the nature of the said scheme, and the proceedings and order of the 19th of February 1858, and the consequent exemption from legacy-duty, were communicated and explained by the defendants' solicitor, as the defendants alleged and believed, to John S. Gardiner, the principal of the Legacy-duty office in Dublin, and to the officers of his department; and, at their request, said order was submitted for their inspection.

Mr. Charles E. Bagot further stated that, on the 30th of March 1860, the order of the 19th of February 1858 was explained by him to B. N. Hinds, an officer in the Legacy-duty office, who, and Mr. Gardiner, suggested that the question of exemption from legacy-duty should again be brought under the consideration of the Master; and that, on the 3rd of April 1860, the defendants filed an affidavit setting forth all the circumstances, for the adjudication of the Master on the question of legacy-duty.

That notice of motion to proceed on this statement was served on the Attorney-General and the other respondents.

That on the 18th of April 1860, the matter came before the Master, when the Attorney-General was represented, and the Master affirmed his former order; and that, on the 23rd of May 1860,

a copy of the order was served on the officers of the Legacy-duty department. M. T. 1861.  
*Eschequer.*

That the order of Master Litton was never appealed from; and defendants submitted that, inasmuch as it was the judgment of a Court of competent jurisdiction, in a proceeding where the Court was duly represented, both the Crown and the Commissioners were concluded.

ATTORNEY-  
GENERAL  
v.  
BAGOT.

That a scheme was prepared to carry out the charitable trusts by the defendants, in conjunction with the Royal Dublin Society, and that the scheme was approved of by the Master, when brought before him on a summons which was served on the Attorney-General. That a deed was prepared, to carry out the scheme, and settled; and that the scheme was in full and public operation before any objection to the order of the 19th of February 1858 was taken on behalf of the Crown.

That by said scheme it was, amongst other things, provided that the said funds should be invested in Government stock, to the credit of the defendants, or other the trustees or trustee for the time being of the said will, and of the Royal Dublin Society; and that an account of its administration should be printed every year, with the proceedings of the Society; but that the funds should be at all times kept apart from the general funds of the Society; and that the dividends of the fund should be applied, after providing for the necessary expenses of the trust, to the endowment of scholarships and money prizes, open to all students of art who should have attended for two years, at least, a school of art in Ireland, or, being of Irish birth, should have attended for the like period a school of art in Great Britain or elsewhere, and who should produce at the exhibition therein mentioned works of art of conspicuous merit, or high promise of future excellence. And they submitted that the said disposal of the said bequest of £2000 was for a purpose merely charitable, and that it was untrue that they disposed of it for any other purpose. And they admitted that the pictures had come into their possession, and stated their value to be £190, and submitted their non-liability to legacy-duty.

To this answer a replication was filed on behalf of the Crown,

M. T. 1861. in which issue was joined as to the allegation in the answer that,  
*Eschequer.*  
 on the 30th of March 1860, B. N. Hinds and J. S. Gardiner sug-  
 ATTORNEY- gestered that the question of exemption of legacy-duty should again  
 GENERAL be brought under the consideration of the Master.  
 v.  
 BAGOT.

The will of George Archibald Taylor, so far as it related to the bequest in question, was in the following terms :—“ And, out of the “ residue of my property, I desire my said executors to retain, in “ priority to any other bequest hereafter made, a sum of £2000, “ to be disposed of by my said executors in such manner as I “ may, by any codicil hereto, direct ; and, in default of any such “ direction by me, to be disposed of by my said executors, to such “ charitable purposes, or for the promotion of art and industry in “ Ireland, in such manner and portion as my said executors shall “ in their discretion think most advisable. . . . . And I bequeath “ my pictures, if not disposed of by codicil, to the Royal Irish “ Institution, meaning the institution that is to have the use of “ the money collected under the Dargan tribute, as giving them “ the use of a building for exhibiting works tending to encourage “ the promotion of Irish art. . . . . And, in case said institution “ is not carried out, I bequeath said pictures to such other insti- “ tution for the exhibition of Irish art and industry as my exe- “ cutors shall select, or for them to use, in such manner as they “ may deem fit, for the encouragement of Irish art.”

The *Attorney-General* (*T. O'Hagan*), with him the *Solicitor-General*, *J. Brooke*, *F. Macdonogh* and *R. Jebb*, for the Crown.

The first question is, is the Crown bound by the decision of Master Litton, made in the cause of *Bagot v. The Attorney-General*, that legacy-duty was not payable on this bequest? We submit not. The fund was not in Court ; the question was not raised for decision, and, though the Attorney-General was a party, he was not present to protect the Revenue. His duty was, in that cause, to sustain the bequest as charitable. The main question, however, is, whether this legacy is exempt from duty, under the words of the 38th section of the 5 & 6 Vic., c. 82, by which, after regulating for the payment of duty on all legacies, it is

provided that nothing in the Act contained "shall extend, or be construed to extend, to charge with duty in Ireland any legacy for the education and maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable." The fund of £2000, given by this will, has been applied by the defendants, in exercise of the discretion vested in them by the will, "for the promotion of art and industry in Ireland," by the establishment of a perpetual endowment for the encouragement of students of the Fine Arts in Ireland. That bequest is not within any of the exemptions in the 38th section. It cannot be said to be within the two first; and it is submitted it is not a "purpose merely charitable," within the last. It is now settled that Fiscal Acts are to be interpreted in the same manner as all other Acts of Parliament—in their popular and grammatical sense: *Lord Saltoun v. The Advocate-General* (a). "Charitable," in its popular sense, means "for the relief of the poor;" and "merely charitable" must mean "purely for the relief of the poor." So the testator, in this case, understood the word "charitable:" for he bequeaths the fund for "charitable purposes," or for "the promotion of art and industry," making a distinction between the objects. It may be admitted that this is a charitable bequest, within the 43 *Eliz.*, c. 4 (*Eng.*). That Act does not apply to Ireland; but Courts of Equity in this country act by analogy to it: *Powerscourt v. Powerscourt* (b); and there is a statute somewhat *in pari materia* (10 *Car.* 1, sess. 3, c. 1), noticed by Sir Edward Sugden, in the case of *The Incorporated Society v. Richards* (c). It is, therefore, a charitable bequest, so far as that the Court of Chancery would settle a scheme to carry it out; but it is not, for that reason, a bequest for a "purpose merely charitable," within the 38th section of the Legacy-duty Act. The 43 *Eliz.*, c. 4, was passed to give validity to a variety of bequests for "charitable or godly uses." The uses mentioned are, the relief of the poor, aged and impotent—the relief of the sick, prisoners, orphans, &c.—for supporting free schools—for repairing bridges, churches and highways—for aiding

M. T. 1861.  
Exchequer.  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

(a) 3 Macq. App. Cas. 659.

(b) 1 Mol. 616.

(c) 4 Ir. Eq. Rep. 177.

**M. T. 1861.** *Exchequer.*  
**ATTORNEY-GENERAL**  
**v.**  
**BAGOT.**

poor inhabitants to pay taxes. Courts of Equity, for the purpose of bringing bequests within the benefit of that statute, have given a very wide definition to the words "charitable uses." It has been held to apply to every gift for the general public use. It will be contended, for the defendants, that the word "charitable" has received a construction in the cases on the 43 *Eliz.*, c. 4, which it must bear wherever used; and that "purpose merely charitable" means a purpose which would be charitable under that statute. That is not so. There are three exemptions in the 38th section—"any legacy for the education and maintenance of poor children." That exemption would be superfluous, if the defendants' argument be true; for it is a charitable use, within the 43 *Eliz.*, c. 4, and, therefore, within the words "merely charitable," in the third exemption. The first exemption was introduced because, without it, the case would not be reached by the 43 *Eliz.* No doubt, the words "merely charitable" must include the instances given; but the special instances are given to show that the general words "merely charitable" are to include things *ejusdem generis*.—[PIGOT, C. B. Your argument is, that they must have intended the restricted construction, when they found it necessary to specify those instances.—FITZGERALD, B. And that is strengthened by the use of the word "merely."]—"Merely" must have some force given to it.—[PIGOT, C. B. The word "merely" will have force in whatever sense the word "charitable" is understood.—FITZGERALD, B. What is your definition of "charitable?" They take it upon the other side from the 43 *Eliz.*, c. 4.]—We are not bound to give a definition, but to show that this is not a purpose "merely charitable." The language, however, of the exemption shows that it was intended to apply to bequests for the relief of the poor. The 16th section of the Succession-duty Act (16 & 17 *Vic.*, c. 51) may be also referred to, in which the distinction is taken between property subject to "charitable purposes" and to "public" purposes.

*H. E. Chatterton and F. Meade, contra.*

The liability of the pictures to duty has not been contended for by the *Attorney-General*. To the claim for legacy-duty on the £2000

we have two grounds of resistance. We first say that this matter has been the subject of decision in a Court of competent jurisdiction; and, secondly, that on the merits the legacy is exempt. In the cause of *Bagot v. The Attorney-General*, the Master, under the Chancery Regulation Act, was the Court. The Master had to decide every question respecting the legacy. Under the 187th Rule of the Rules of 1843, the Master cannot allow credit to an executor for payment of a legacy, unless the receipt of the proper officer is produced, of the payment of the duties. It was, therefore, within the jurisdiction of the Master to ascertain whether or not the duty was paid. The question was discussed in the presence of the *Attorney-General*, who must be taken to have been there for all purposes in which the rights of the Crown were concerned.

M. T. 1861.  
*Eschequer.*  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

Then, as to the second question, which depends entirely on the language of the Legacy-duty Act. The first Act was the 56 G. 3, c. 56, which, in the schedule, contains an exemption from legacy-duty, in the case of "legacies given for the education or maintenance of poor children in Ireland, or to be applied in support of "any public charitable institution in Ireland, or for any purpose "merely charitable." The analogous Act in England (55 G. 3, c. 84) contains no such exemption. Then the 5 & 6 Vic., c. 82, adopted the schedule to the English Act, 5 & 6 G. 3, c. 84; but as that would have done away with the exemption, if there were no special enactment on the subject, the 38th section of the 5 & 6 Vic., c. 82, contains the exemption in question, which is in the same terms as that in the 56 G. 3, c. 56, with the exception that it leaves out the word "public." It has not been attempted, on the other side, to give a definition of "charitable." They only suggest that it may mean "merely for the benefit of the poor." But the 43 Eliz., c. 4, and the 9 G. 2, c. 36, contain language similar to that used in this 38th section. That language had a recognised judicial construction when the 5 & 6 Vic., c. 82, was passed; and it is a rule of law that words in Acts of Parliament are to be construed by reference to the then existing judicial construction of similar words: *Earl of Waterford's claim (a)*, per Lord Cottenham; *Dos d. Ellis*

(a) 6 Cl. & Fin. 133.

M. T. 1861.  
*Eschequer.*  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

v. *Owens* (a), per Parke, B. Sir William Grant, in *Morice v. Bishop of Durham* (b), has given a definition of "charitable," which has been universally followed. He says:—"Then is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here, its signification is derived chiefly from the statute of *Elizabeth*. Those purposes are considered charitable which that statute enumerates, or which, by analogies, are deemed within its spirit and intent; and to some such purpose every bequest to charity generally shall be applied." In *Townley v. Bedwell* (c), a gift of real and personal estate, for the purpose of establishing a perpetual botanical garden, was held a charitable bequest, and, therefore, void, because the testator had said he trusted it would be for the public benefit. So *The Trustees of the British Museum v. White* (d); *Whicker v. Hume* (e). These cases show that "charitable," in Acts of Parliament, has received a judicial interpretation. No doubt, there may be something in the Act to qualify this interpretation. In the present case, accordingly, the use of the word "merely," in the 38th section of the 5 & 6 Vic., c. 82, has been relied on; but, before any force can be given to that word, a construction must be put upon "charitable." If it bear the construction for which we contend, the use of the word "merely" proves nothing.

The *Solicitor-General*, in reply.

If the Court is prepared to decide that it was the intention of the Legislature to include, in the 38th section of the Legacy-duty Acts, matters equally extensive with those in the 43 *Eliz.*, c. 4, the question will be solved at once; but, if that is not so, we are not called on to give a definition of "charitable," but to show that this bequest is one not "merely charitable." The words

(a) 10 M. & W. 524.

(b) 9 Ves. 399.

(c) 6 Ves. 194.

(d) 2 Sim. & Stn. 594.

(e) 1 De G., M. & G. 506; S. C., 7 H. of L. Cas. 124.

"merely charitable" clearly do not include every bequest valid under the statute of *Elizabeth*. The general words in the earlier part of the 38th section would make every legacy liable. Something is taken out by the exemptions. The first is a legacy "for the education and maintenance of poor children in Ireland." Would a legacy for the education of children of rich persons be exempted? No; for that is impliedly excluded; *inclusio unius est exclusio alterius*; but a bequest for the founding of colleges for the wealthy would be within the statute of *Elizabeth*. The three exemptions in the 38th section deal with matters *ejusdem generis*; and, once we show that the subjects of the two statutes are not co-extensive, the test whether the bequest is a charitable bequest, under the 43 *Eliz.*, c. 4, has no application; and "charitable" must be understood in its popular sense. Some force then must be given to the word "merely," that is, "purely." It lies upon the defendants to bring themselves within the exemption. They utterly fail in this, once we show that the interpretation of the word "charitable" is not necessarily to be taken from the 43 *Eliz.*, c. 4, or the Mortmain Act.

M. T. 1861.

*Eschequer.*ATTORNEY-  
GENERAL

v.

BAGOT.

*Cur. ad. vult.*


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The judgment of the Court was delivered by—

FITZGERALD, B.

The information in this case has been filed against the defendants, Bagot and Leech, as executors of the will of the late George Archibald Taylor, for the purpose of obtaining payment of duty alleged to be payable to the Crown, in respect of two legacies bequeathed by that will. At the hearing before us, in the present Term, the claim for duty, in respect of one of those legacies, was abandoned by the *Attorney-General*. The other legacy is of a sum of £2000, which the testator, by his will, dated the 30th of June 1854, bequeathed, to be disposed of by his executors in such manner as he might, by any codicil to his will, direct; and, in default of any such direction by him, to be disposed of by his said executors towards charitable purposes, or for the promotion of art

Nov. 18.



M. T. 1861.  
*Eschequer.*  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

and industry in Ireland, in such manner and portions as his said executors should, in their discretion, think most advisable. The testator gave no further directions by codicil, and died on the 2nd of October 1854. The claim for duty in respect of this legacy is resisted by the executors, on the ground, amongst others, that the bequest is a charitable bequest; and that, by the 38th section of the statute 5 & 6 Vic., c. 82, being the Act to assimilate stamp-duties in Great Britain and Ireland, it is provided that nothing in the Act contained "shall extend, or be construed to extend, "to charge with duty in Ireland any legacy for the education and "maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose "merely charitable."

It appears that, on the 26th of June 1856, the defendants, as such executors, filed a cause petition in the Court of Chancery, against the Attorney-General and other parties, for the purpose, amongst other things, of having this bequest declared a valid charitable bequest, and having a scheme settled for carrying out the same. To that petition the Attorney-General appeared; and Master Litton (to whom it was referred), by his final order, of the 19th of February 1858, declared the said bequest to be a good and valid charitable bequest, and directed the executors forthwith to prepare a scheme for carrying out the testator's intentions in relation thereto. In pursuance of this order, a scheme was prepared, and submitted to the Master, on notice to the Attorney-General, and duly approved of by an order of the 21st of March 1860. It is not necessary to state the particulars of this scheme, further than that it disposes of the legacy, in the institution of a perpetual endowment for the encouragement of the students of the Fine Arts in Ireland. It is admitted that the legacy in question has been thus conclusively established as a charitable bequest; but the contention on the part of the Crown has been, that it is not a legacy for a purpose merely charitable, within the meaning of the statute 5 & 6 Vic., c. 82: and the real question in the case turns on the meaning of the words "any purpose merely charitable," in the 38th section of that Act. That a number of decisions in this country, and in England, on the

construction of private instruments, and of Acts of Parliament, have put a meaning on the words "charitable purposes," is not questioned; and it would seem to me that it can only be on very strong reasons that we should suppose that the Legislature has used the words without reference to those decisions which now constitute a very extensive and very well-known head of the law. "This Court," says Lord Langdale, speaking of the Court of Chancery, "has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the statute of *Eliz.* (43 *Eliz.*, "c. 4), or one of such purposes as the Court construes to be charitable, by analogy to those mentioned in that statute:" *Kendall v. Granger* (a). That the bequest in question is for a charitable purpose, within these limits, has been already decided by the Court of Chancery between the parties in this suit; but, in the construction of the Revenue statute before us, it is said that we are further to narrow the limits of charitable purposes. The narrower purpose suggested I understand to be, the having the poor for the sole or especial objects of the bequest. The arguments for this construction I understand to be two. First; it is said that the words "any purpose merely charitable" follow an enumeration of particular objects, and that the purposes intended ought, therefore, to be considered as *ejusdem generis* with the particular ones mentioned. Secondly; it is said that the word "merely" directly points to purposes of which the charitable qualification is sometimes restricted. To the first of these positions it seems to me enough to say that the rule "*noscitur a sociis*," if admissible, really affords no aid whatever. Of the two antecedent particulars specified, one is qualified by the attribute "charitable;" so that, before any aid can be derived from it, in the construction of the more general words, the meaning of the word in question must be ascertained. To the second, it seems to me quite enough to say, as was said by my LORD CHIEF BARON, in the course of the argument, that the word "merely" plainly admits of an equally sensible explanation in whatever sense the word "charitable" is expounded. It can, therefore, afford no aid in arriving at

M. T. 1861.

*Exchequer.*ATTORNEY-  
GENERAL

v.

BAGOT.

(a) 5 Beav. 300, 302.

M. T. 1861.  
*Exchequer.*  
 ATTORNEY-  
 GENERAL  
 v.  
 BAGOT.

the exposition of that word. You must first determine what is a charitable purpose, before you can resolve whether a particular purpose suggested be or be not merely so. On the other hand, we have as our guides, in ascertaining the meaning of the Legislature, two classes of decisions on the English Mortmain Act (9 G. 2, c. 36). First, in the construction of that Act, the words "charitable uses" have been held to include bequests for all purposes which the Court of Chancery, acting on the principle already mentioned, holds to be charitable. Secondly; on that Act have arisen cases as to whether bequests are or are not for purposes merely charitable—those cases, viz., in which there is a bequest to particular legatees, to which the statute does not apply, accompanied by a disposition void by the operation of the statute. In those cases, the rule is, that, if the two objects are not inseparably blended, the bequest in favor of the unobjectionable purpose will be supported, though the charitable disposition should fail; but if the unobjectionable bequest be *so mixed up with the purpose of the charity as to be dependent on it*, the bequest must be considered indivisible and void. *Blandford v. Thackerell* (a) is an instance of the former class; and *Durour v. Motteux* (b) is an instance of the latter. These cases seem to me very clearly to show what is meant by a bequest merely charitable.

On the whole, I entertain no doubt that the bequest here, having been decided in a suit between the same parties to be a charitable bequest, and a scheme having been settled by the Court of Chancery, for its execution as a merely charitable bequest, is a bequest for a purpose merely charitable, within the meaning of the 5 & 6 Vic., c. 82.

It is not necessary to offer any opinion on the other point argued, viz., that the question of liability to legacy-duty was already *res judicata* between the parties. The information must be dismissed; and, for my part, I see no reason for saying that it should not be dismissed with costs.

(a) 4 Bro., C. C., 394.

(b) 1 Ves. sen. 328.

H. T. 1862.  
*Exchequer.*

## O'CONNOR v. STEPHENS.\*

Jan. 22.

**EJECTMENT ON THE TITLE.**—The premises sought to be recovered in the ejectment were described in the summons and plaint as “All that and those the mines, veins and seams, strata and beds of coal, culm, and all coal substances upon and underneath the lands of Middle Ballylethane, and all the rights, liberties, powers and privileges, with the appendances thereunto belonging, or there-with used, situate in the barony of Ballyadams, in the Queen’s County.” The plaintiff claimed title from the 14th day of July 1860.

The defendant, Thomas B. Stephens, took defence for all the premises.

The case was tried before the Lord Chief Justice, at the Summer Assizes of 1861, for the Queen’s County.

The plaintiff read in evidence the following documents— a lease of the premises included in the ejectment, dated the 1st of December 1859, from William Hovenden to John Foulds, for the term of twenty-one years, at the rent of £50 ; attested copy of a judgment of 9th of July 1860, *Thomas Best v. John Foulds*, for the sum of £190. 9s. 11d., and of an execution thereon, dated the 14th of July 1860, returnable the 27th of July 1860 ; also the attested copy of the return thereon, dated the 4th of September 1860.

The plaintiff also proved an attested copy of a judgment, *Perrott and Green v. Foulds*, for the sum of £329. 15s. 9d., dated the 26th of July 1860. The Sub-sheriff of the Queen’s County was then examined on behalf of the plaintiff ; and he proved that, on the 14th of July 1860, a writ of *feri facias* was lodged, in *Best v.*

the registry of the other, and which, but for that registry, must have been capable of being registered, so as to maintain its priority, the registration of the other deed will not give that other deed priority.

A Sheriff, under a writ of *feri facias*, seized, on the 16th of July 1860, the interest of the execution debtor in a term of years ; and, having sold to the plaintiff in ejectment, on the 31st of July, executed to him the usual conveyance of the debtor’s interest, on the 20th of August.

The debtor, on the 30th of July, after the seizure, conveyed the term to the defendant. This deed was registered on 2nd of August. The plaintiff’s deed was unregistered.

*Held*, that the conveyance of the 30th of July acquired no priority by registry.

Where the conflict is between two deeds, of which that one alleged to be postponed only by reason of

\* Before the Full Court.

H. T. 1862. *Foulds*, and that he executed this writ on the 16th of July; that Exchequer. he remained in possession until the 31st of July, when he sold to the plaintiff Thomas E. O'Connor, and that he executed a deed of conveyance to him, on the 20th of August 1860. The conveyance from the Sheriff, of that date, was then read in evidence for the plaintiff.

O'CONNOR  
v.  
STEPHENS.

The defendant proved an agreement of the 17th of July 1860, from John Foulds, the execution debtor, to him, for a sale of the premises in the ejectment, and a formal conveyance in pursuance of that agreement, dated the 30th of July 1860. He also gave in evidence the certificate of registration of this deed, on the 2nd of August 1860. The jury found that the sale of the 30th of July 1860 was a *bona fide* transaction. The Lord Chief Justice thereupon directed a verdict for the plaintiff, with mesne rates, assessed by consent at £25. Counsel for the defendant called upon his Lordship to direct a verdict for the defendant, upon the ground that the defendant's deed, by virtue of its registry, had priority over the plaintiff's deed, which was not registered. His Lordship refused so to direct the jury, but reserved liberty for the defendant to move to have the verdict turned into a verdict for him, if the Court should be of opinion that the law was as stated by the defendant's Counsel.

*C. Pallas* having in Michaelmas Term obtained a conditional order to enter a verdict for the defendant, or for a new trial—

*G. Battersby*, with him *J. T. Ball* and *W. J. O'Driscoll*, now showed cause.

The property in the term vested in the Sheriff upon the lodgment of the writ. He was assignee in law, and that step in the title was incapable of registration. The title, therefore, given by the Sheriff was incapable of registration, so as to maintain priority: *Lessee Rennick v. Armstrong* (a); *Fury v. Smith* (b). As registration of the Sheriff's deed could not maintain its original priority

(a) Molesworth on Registration, p. 41.

(b) Ibid.

over the deed of the execution debtor, the registration of that deed which, independent of the Registry Act, conferred no title at all, gave it no priority. A person deriving his title by a transmission incapable of registration, so as to gain priority, cannot be postponed to the subsequent registered conveyance of the person from whom he derives: *Warburton v. Loveland* (a). Further, no registry of our deed could have bettered our position. Their deed was registered before the plaintiff's deed was executed at all. The Registry Act never applies where registration is matter of indifference.—[FITZGERALD, B. They must maintain this—The seizure by you was on the 16th, and the sale on the 31st—their deed was on the 30th; they might have registered it then, and, if they are right, they might then have ejected the Sheriff.]—Their registered deed, on the 3rd of August, was good against nothing except a previous unregistered deed. On that day there was no unregistered instrument to conflict with it. The Act cannot operate to take from the plaintiff a title which he otherwise would have had, as a penalty for not doing a thing which it was impossible to do.

H. T. 1862.  
*Eschequer.*  
 O'CONNOR  
 v.  
 STEPHENS.

*D. C. Heron and C. Pallas, contra.*

The Sheriff acquired no property in the chattel real by reason of the seizure.—[FITZGERALD, B. They say the lodgment of the writ, and seizure by the Sheriff, put the debtor under an incapacity to assign.]—Seizure under the writ did not put the property more completely out of the debtor than a deed would.—[FITZGERALD, B. If you are right, the consequence would be this—If a man marries a woman entitled to a term of years which vests in the husband, and the husband conveys the term to a purchaser, and the wife afterwards conveys it to another, her deed would prevail.]—The Sheriff cannot have a higher right than a grantee under a deed.—[FITZGERALD, B. What you are now contending is, that the assignee in law is not in a better position than a purchaser under an unregistered deed.]—If the conveyance to the plaintiff, of the 20th of August, be out of the case and void, the plaintiff has no

(a) 2 Dow. & Cl. 480.

H. T. 1862.

Exchequer.

O'CONNOR

v.

STEPHENS.

title. We displace their title, if the Registry Act makes the conveyance void. It is said we do not claim through the same grantor; but the question depends upon the 5th section of the Registry Act, the words of which are general:—"Every deed or conveyance, not registered, which shall be made after the 25th of March 1708, of all or any of the honours, manors, lands, tenements or hereditaments comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this Act, shall be deemed and adjudged to be fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor, &c., as, for and concerning all or any of the honours, manors, lands, tenements or hereditaments contained or expressed in such memorial registered as aforesaid." It must be contended, upon the other side, that this section applies solely to deeds from the same grantor; but it is in the most general terms, and is not qualified by the restrictive words which occur in the 4th section—"according to the right, title and interest of the person or persons so conveying." They cited *Warburton v. Loveland* (a); *Eyre v. M'Dowell* (b).

PIGOT, C. B.

We do not think it necessary to postpone our judgment in this case. The view we take of it may be shortly stated. It is unnecessary to enter in detail into many of the arguments that have been urged before us.

The real question to be determined is, whether the Registry Act, 6 *Anne*, c. 2, has altered the relation in which every execution creditor, by *fieri facias*, and every execution debtor of such creditor, stood towards each other in reference to chattels real, when the statute passed, and in which they would now stand, if the Registry Act has not altered their relation?

Irrespectively of the Registry Act, the lodging of a writ of *fieri facias* with the Sheriff, and the subsequent seizure, gave the Sheriff

(a) 2 Dow. &amp; C. 480.

(b) D. P. (not yet reported).

a right to sell the chattel real; and, according to the law in force when the Registry Act passed, under the Statute of Frauds, the sale, and the assignment by the Sheriff to the purchaser, gave the purchaser a title which could not be displaced by any act of the debtor subsequent to the lodging of the writ. By a recent statute<sup>(a)</sup>, a purchaser, before actual seizure, without notice of the lodging of the writ, would be protected. Before any registration of any instrument, the Sheriff, when in possession under the writ, becomes entitled to maintain that possession against the debtor, and against the debtor's vendee or assignee. The Sheriff being in possession, and there being no deed with respect to which any question arises, or over which any priority can be gained, or which can be considered fraudulent and void against any other deed, the assignee of the debtor, whether he does or does not register his deed, cannot turn out the Sheriff by means of any act by which the debtor seeks to convey property which, by virtue of a *fiery facias*, is under seizure of the Sheriff.

H. T. 1862.  
*Exchequer.*  
 O'CONNOR  
 v.  
 STEPHENS.

If the Sheriff can so defend his possession, his assignee can do so, unless the Registry Act interposes; and the proposition of the defendant's Counsel is, that, by force of the Registry Act, a right is acquired by the person having an assignment from the debtor, subsequent to the seizure, which right never could be made available against the Sheriff, so long as the Sheriff should hold under the writ, but which, nevertheless, may be made available against the Sheriff's assignee, although he became such assignee under circumstances in which he could not possibly fortify his title by means of registry. It is a plain and sound principle, that neither the Common Law, nor any existing statute, can be repealed by affirmative words of an Act of Parliament, unless the legislation be clear, or there is, arising upon the face of the Act, a plain implication that the Legislature so intended.

I find nothing in the Registry Act to indicate any intention to alter, on this subject, the existing state of the law, unless it be contained in the 5th section.

(a) 19 & 20 Vic., c. 97, s. 2.



H. T. 1862.

*Eschequer.*

O'CONNOR

v.

STEPHENS.

That section enacts, in effect, that an unregistered deed shall be deemed fraudulent and void against a registered deed, as to "honours, manors, lands," &c., which are comprised in the unregistered deed, and in the memorial of the registered deed. The section plainly contemplates a conflict between two deeds, one registered, and the other unregistered. It would be to impute to the Legislature an intention absurd and unjust, to treat them as intending that where, irrespective of registry, one deed confers a title, and the other confers none, and the priority of the former cannot be maintained by means of registry, it shall lose its priority by the registry of the other deed. The assignment from the Sheriff, when the Registry Act was passed, derived its force and priority from the lodging of the writ of *feri facias* with the Sheriff. It derives that priority now (if the Registry Act does not displace it), at the latest, from the seizure by the Sheriff. Neither the writ, nor the lodgment, nor the seizure, can, as the law now stands in Ireland, be registered. The intervening assignment by the debtors is a nullity against the writ so lodged (or against the seizure so made), and against the assignment from the Sheriff, if the Registry Act does not reverse the relative rights so existing. I think the 5th section of the Registry Act must be construed as only applying to a condition of things in which a conflict arises between two deeds, of which that which is to be postponed *only* by reason of the registry of the other, and which, but for that registry, *must* have priority, is capable of being registered, so as to have its priority maintained. It is but imputing common sense to the Legislature to hold that, when they passed the Registry Act, they could not have intended so far to repeal the Statute of Frauds as to enact that a registered deed should, by reason of its registry, acquire priority over another deed which it was impossible, by any diligence, to register under the Act, and as to which the Act gave no means of securing the priority conferred upon it by the existing law. The Statute of Frauds gave it that priority against the assignment of the debtor. Without clear words of enactment, or clear implication arising upon the Registry Act, we ought not to give to the registry of the

debtor's assignment, subsequent to seizure, a force which would enable every debtor, having chattels real taken under a *fiery facias*, to defeat the execution creditor, by an assignment to a purchaser, against whom fraud could not be proved.\*

H. T. 1862.

*Exchequer.*

O'CONNOR

v.

STEPHENS.

\* The present state of the law, in Ireland, in reference to chattels real, and to execution by *fiery facias*, is calculated to create inconveniences in purchases of lands held under leases for years, which does not now exist in England. According to the decision in the case here reported (and, it is believed, according to the established practice in advising upon titles to chattels real), it is not deemed safe for a purchaser to complete his purchase until he shall have ascertained, by *personal inquiry from the Sheriff*, that no writ of execution has been lodged with the Sheriff against the vendor, the owner of the chattel real. Generally this information may be obtained; but there are no means of enforcing it; and there is no adequate security that, when obtained, its accuracy may be fully relied on. Again, if there be a seizure before the writ is returnable, the sale may take place afterwards; and thus a writ of *fiery facias* may be finally executed, by sale and assignment, at any time within a year (Irish Common Law Procedure Act, 16 & 17 Vic., c. 113, s. 141); and during that time, although the debtor may be supposed to remain in possession of the property, a purchaser from him cannot complete his purchase otherwise than subject to such execution, and to the risk and liability of being displaced by a vendee and assignee of the Sheriff. It is believed that, practically, the instances are rare in which a *bona fide* purchase has been defeated by the assignee of a Sheriff selling under a writ of *fiery facias*. But it is plain that the existing state of the law, in Ireland, has a tendency to impede the transfer of lands held under leases for years, and to create troubles, risk and responsibility, in making out title, which do not, from any analogous cause, exist now in reference to freehold estates. In England, this inconvenience has been remedied by the early sections of the "Act to further Amend the Law of Property," 23 & 24 Vic., c. 38. By those sections provision is made for the registry of writs of execution, and for the protection of all purchasers and mortgagees, whose purchases or mortgages shall be prior to the *issuing and registering* of the writ. It is, however, expressly provided by the Act that those sections shall not extend to Ireland. This is the more to be regretted because, in Ireland, the provisions of the Act, in reference to registry, might be applied, without the creation of any new office, by means of the office for the issuing and sealing of writs for all the Courts of Law, created by the 13 & 14 Vic., c. 18, s. 84, *et seq.*, or by means of the office for the registry of deeds and judgments. The 23 & 24 Vic., c. 38, provides (section 1), "That no judgment, statute or recognizance, to be entered up after the passing of this Act, nor any writ of execution, or other process thereon, shall affect any lands of any tenure, as to a *bona fide* purchase or mortgage, although execution or other process shall have issued thereon, and *have been duly registered*, unless such execution or other process shall be executed and put in force within *three calendar months* from the time when it was registered." If this provision should be held to apply to a purchaser buying for value, and for his own benefit, though with notice of the execution (and notice is made immaterial by the previous part of the section, where there is no registry of the execution), it may become the means either of defeating the execution of a creditor, giving a

H. T. 1862.

*Exchequer.*

O'CONNOR

v.

STEPHENS.

reasonable indulgence to his debtor, for the purpose of settling his affairs; or of altogether preventing any such indulgence being ever given. Either of these results is much to be deprecated; and it would seem that all reasonable protection will be given, and all necessary facilities for the transfer of chattels real will be secured, by the other provisions of this statute (23 & 24 Vic., c. 38), without the proviso above referred to.

M. T. 1861.

Nov. 15, 21,  
22.

H. T. 1862.

Feb. 15.

## M'AREAVY v. HANNAN.\*

A and B, by lease, dated the 13th of January 1831, reciting that A had mortgaged to B the premises included in the lease, demised certain premises to C. The rent was reserved to A, the mortgagor, and also the powers of distress and re-entry. A and B, in the year 1836, assigned their interest to D, who brought ejectment for non-payment of rent.—*Held*, that C was not estopped from disputing the title of A.

*Held also*, that, independently of the Landlord and Tenant Law Amendment Act, D could not maintain ejectment for non-payment of rent.

*Held also*, per FITZGERALD, HUGHES and DEASY, BB., that the relation of landlord and tenant, within the meaning of the 3rd section of the Landlord and Tenant Law Amendment Act (23 & 24 Vic., c. 154), did not subsist between D and C.

*Per* PIGOT, C. B.—The 3rd section of that statute is not retrospective.

EJECTMENT for non-payment of rent, to recover the possession of the premises known as No. 109 Cromac-street, in the town of Belfast, held by the defendant as tenant to the plaintiffs, or one of them, under a lease, at the yearly rent of £6. Of this rent twenty years' arrears, viz., £120, up to the 1st of May 1861, were alleged to be due.

The summons and plaint was issued on the 24th of May 1861. The defendant pleaded that he did not, nor did any other person, hold the plot of ground and premises in plaint mentioned, as tenant to the plaintiffs, or either of them, under the lease in plaint mentioned, or any other lease, or in any manner: and, as to the claim of £120 for twenty years' rent, save as to the last six years thereof, the Statute of Limitations.

The case was tried at the Summer Assizes of 1861, for the county of Antrim, before DEASY, B., when the material facts appeared to be the following:—By deed, dated the 13th day of January 1831, made between William Wauchope, of the first part, Bryan Cooney, of the second part, and Patrick Murray, of the third part—reciting that by lease, dated the 1st of June 1829,

\* Before the Full Court.

M. T. 1861.

Eschequer.

M'AREAVY

v.

HANNAN.

the Marquis of Donegal demised to the said Bryan Cooney, his heirs and assigns, all that field near Cromac, containing, by estimation, 1a. 3r. 30p., plantation measure, or thereabouts, be the same more or less, then in the possession of the said Bryan Cooney; bounded on the east by a field then in the possession of John Holmes Houston; on the west by Cromac-street; on the north by the Spa Loming, and on the south by Cromac dock or basin, being part of the premises formerly demised to Bryan Mulholland, with the appurtenances; to hold unto the said Bryan Cooney, his heirs and assigns, during the lives of the several *cestui que vies* therein named, and the lives and life of the survivors and survivor, and such other lives as should be added thereto, by virtue of the covenant for perpetual renewal therein contained, subject to the payment of the yearly rent of £16. 12s. 4d., and £1. 5s. 0d. renewal fine; and reciting that the said Bryan Cooney did afterwards grant the said piece or parcel of ground, tenement and premises, with others, in mortgage, unto the said William Wauchope, his heirs, executors, administrators and assigns, subject to redemption; and reciting that the said Patrick Murray had come to an agreement with the said Bryan Cooney for a lease for three lives renewable for ever, of a certain portion of the premises demised by said lease, which portion was thereafter particularly mentioned and described; and that the said William Wauchope, at the instance and request of the said B. Cooney, had agreed to become a granting party to said indenture—said deed witnessed that the said William Wauchope and Bryan Cooney, according to their respective estates and interests, granted and demised to Patrick Murray, his heirs and assigns, all that and those that piece or parcel of building ground situate on the west side of Cromac-street, containing, in front of said street, sixteen and a-half feet, extending backward, from front to reare, fifty-seven feet, be the said admeasurements, or either of them, more or less; bounded on the east by Cromac-street; on the west by building, the property of Alexander Williamson; on the north by part of a field belonging to Mr. Joy, and, on the south by building ground, the property of the said Bryan Cooney, with the appurtenances, all

M. T. 1861. *Exchequer.*  
**M'AREAVY**  
*v.*  
**HANNAN.**

situate in Cromac-street, in the town of Belfast: to hold for three lives, and the lives and life of the survivors and survivor, and such other life and lives as should be added, pursuant to the covenant for perpetual renewal; yielding and paying unto the said Bryan Cooney the yearly rent of £6, on every 1st of May and 1st of November; and also yielding and paying unto the said Bryan Cooney, his heirs and assigns, £1. 5s. 0d. renewal fine, and £1 upon the death of Patrick Murray, and every other chief tenant dying in possession, in lieu of an heriot. The lease then contained a clause of distress and re-entry to B. Cooney, and covenants by Patrick Murray, with William Wauchope and B. Cooney, to pay the rent to B. Cooney, and to keep in repair; and joint and several covenants by William Wauchope and B. Cooney, for the renewal of the lease, and a covenant by B. Cooney for quiet enjoyment.

The lease of the 13th of January 1831 was assigned to the defendant, by a deed of the 7th of November 1831.

By deed, dated the 26th of November 1836, made between the said William Wauchope, of the first part, Bryan Cooney, of the second part, and John M'Auley, of the third part, reciting a lease from the Marquis of Donegal to Bryan Cooney, of a piece of ground on the west side of Cromac-street, and dated the 12th of June 1829, and a mortgage thereof to William Wauchope, the said William Wauchope demised, and the said Bryan Cooney confirmed, unto the said John M'Auley, his heirs and assigns, all that piece of ground situate on the west side of Cromac-street, in the town of Belfast, containing, in front next Cromac-street, 173 feet, or thereabouts, and extending backwards ninety-two feet; bounded on the north by John Gaffikin's holding; on the south by the paper-mill water; on the east by Cromac-street, and on the west by a field in the possession of Henry Joy, with the appurtenances; "excepting and always reserving all such matters and things as are excepted and reserved in and by the original lease by virtue of which the said Bryan Cooney holds the same; and also excepting and reserving all such matters, grants, leases, as are heretofore made by the said Bryan Cooney to the different

“undertenants holding different parts of said demised premises:” to hold for the same lives as in the original lease, with covenant for perpetual renewal; yielding and paying to the said Bryan Cooney the yearly rent of £55, and £1. 5s. 0d. renewal fine, and £1 as an heriot, upon the death of every chief tenant. The lease then contained clauses of distress and re-entry, and the usual covenants, all reserved to and made with Bryan Cooney.

M. T. 1861.  
*Eschequer.*  
**M'AREAVY**  
*v.*  
**HANNAN.**

John M'Auley died in the year 1840; and the plaintiff John M'Areavy was his executor, and the other plaintiff John M'Auley was his heir-at-law.

The plaintiffs having closed their case with this evidence, Counsel for the defendant called for a nonsuit, or a direction, upon the ground that the lease of the 13th of January 1831 reserved the rent to the mortgagor, and not to the mortgagee, and that the rent was thereby severed from the reversion, and became incapable of being made the subject of an action of ejectment for non-payment of rent; and also because, neither under said lease, nor under the deed of the 26th of November 1836, did the relation of landlord and tenant exist between the plaintiffs and defendant; and also because the lease of the 26th of November 1836 was a lease of land at a rent, and not of a reversion, and did not comprise the premises demised by the lease of the 13th of January 1831. Counsel for the plaintiff then applied for permission to examine a witness to prove that the premises sought to be recovered in the ejectment were part of the premises comprised in the lease of the 26th of November 1836. This evidence was objected to on the part of the defendant, but was received by the learned Judge. The defendant's Counsel also submitted that in no event could the plaintiffs recover more than six years' rent.

His Lordship directed a verdict for the plaintiff, for £120, the entire amount of the rent claimed, but reserved liberty to the defendant to move to have a nonsuit or verdict for him entered, or that the verdict should be reduced from twenty years' to six years' rent.

A conditional order having been obtained, in the following Term, to set aside the verdict, and to enter a nonsuit, or a verdict for the

M. T. 1861. defendant, or, in case the verdict should not be set aside, that  
Exchequer. the verdict should be reduced from twenty years' rent to six  
 M'AREAVY years' rent—  
 v.  
 HANNAN.

*H. Joy* (with him *W. D. Andrews*) now showed cause.

First; it is said the assignment of the 26th of November 1836 does not comprise the premises demised by the lease of the 13th of January 1831. But the question is closed by the finding of the jury, that the premises included in the ejectment are part of those included in the deed of the 26th of November 1836. Then it is contended that the rent and reversion of the lease of 1831 did not pass by the deed of 1836; that in fact the lease of 1831 is excepted out of it; but the meaning of the alleged exception, "excepting and reserving all such matters, grants, leases, as are heretofore made by the said Bryan Cooney," plainly is, that the grant was to be subject to Cooney's sub-leases. The mere grant by deed of lands, the interest in which is a reversion, will pass the reversion and the rent: *Shep. Touch.*, p. 276. But it is then contended that, even assuming that to be so, M'Auley is not entitled to maintain ejectment for non-payment of rent, because the lease of 1831, which was made by mortgagor and mortgagee, reserved the rent to Cooney the mortgagor, and thus severed the rent from the reversion. The answer to that is, that, by the deed of 1836, the rent and reversion were re-united in one person. *Morrison v. M'Anaspie* (a) may be cited against the plaintiff upon this point; but, in that case, the mortgagee did not join in the demise; the lease was merely made with his consent. At all events, ejectment is maintainable under the Landlord and Tenant Law Amendment Act 1860 (23 & 24 Vic., c. 154). The 52nd section of that Act provides that the landlord's title, in ejectment for rent, shall not "be defeated by proof merely that the "legal estate in the rent or lands is vested in any other person not a "party to such suit or proceeding, but who would be a trustee for "the plaintiff, provided that the plaintiff was, at the time of the "institution of such suit or other proceeding, the person substantially

(a) 2 Ir. Com. Law Rep. 366.

“and beneficially entitled to the rent:” and the 53rd section does away with the necessity of proving the existence of any legal reversion in the landlord, provided a tenancy between the parties shall appear to exist. All that is required is, that the relation of landlord and tenant shall exist, which is defined by the 3rd section of the Act:—“The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon any tenure or service; and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another, in consideration of any rent.” Those provisions were intended to meet cases of the kind now before the Court.—[FITZGERALD, B. They would plainly apply to cases like *Pluck v. Digges*, and to fee-farm rents; but must not the rent be payable to the person from whom the land comes? ]—Here, the mortgagor and mortgagee join in the grant of the land. The 3rd section of the 23 & 24 Vic., c. 154, is retrospective. That question depends on the intention of the Legislature; and the section will be nullified if it is held to have only a prospective operation: *Barton v. Major* (a); *Towler v. Chatterton* (b); *Re Simson's Trusts* (c); *Wright v. Hale* (d).

M. T. 1861.  
*Exchequer.*  
 M'AREAVY  
 v.  
 HANNAN.

Serjeant *Sullivan* and *H. Law*, contra.

The rent did not pass at all by the deed of 1836. It was but a rentcharge in the mortgagor at the time; and the deed of 1836 only operated as a demise of a specific portion of ground, of the land; and as the rentcharge was a distinct property, it did not pass: *Shep. Touch.*, p. 92. Again, the exception of “leases” includes the lands comprised in the leases. It is clear that, before the passing of the 23 & 24 Vic., c. 154, ejectment for non-payment of rent could not be maintained. The lessee in the lease of 1831 is not estopped from showing that the lessor has not the legal estate; for the mortgage to Wauchope is recited in the lease. A tenant is estopped from disputing his landlord's title; but that rule is subject to this qualifi-

(a) 2 Ir. Com. Law Rep. 28.

(b) 6 Bing. 258.

(c) 1 John. & H. 89.

(d) 6 H. & N. 227.



M. T. 1861.  
Exchequer.  
**M'AREAVY**  
 v.  
**HANNAN.**

cation, that, if the lease show the lessor has only an equitable title, there is no estoppel: *Pargeter v. Harris* (a). It is only an instance of the rule that an instrument creates no estoppel, if the truth appears upon the same instrument. The deed of 1831 operated as the lease of the mortgagee, and the confirmation of the mortgagor. The reservation of the rent to the mortgagor, a stranger, severed the rent from the reversion. It became a rentcharge in Cooney, and not a rent-service; and, as he had no reversion, he clearly could not maintain ejectment for non-payment of rent. Then it is said the rent and reversion became united in the grantee in the deed of 1836; but the accidental union of the rentcharge and the reversion in a third person could not re-annex the rent to the reversion, and make it a rent-service. Upon that point, the case of *Morrison v. M'Anaspie* (b), is a conclusive authority. The 23 and 24 Vic., c. 154, does not improve the plaintiff's position. In the first place, the case is not within the Act, supposing it retrospective; for there is no relation of landlord and tenant subsisting. There is no agreement to hold land under the mortgagor. If A demise lands to B, reserving rent to C, B and C are not landlord and tenant. The rent must be payable to the person from whom the land comes. Secondly; the 3rd section of the 23 & 24 Vic., c. 154, is not retrospective. It is clearly not so in express words; and, at the date of the passing of the Act, the defendant had in him a vested right to resist an action, which is a right just as valuable as a right of action. That right cannot be taken away without clear legislation. The maxim of law is, *nova constitutio futuris formam imponere debet, non præteritis*: *Broom's Legal Maxims*; 2 Inst., p. 292. The words of the 3rd section are, "The relation of landlord shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service; and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another, in consideration of any rent." That language is entirely prospective. It is "shall be," and not

(a) 7 Q. B. 708.

(b) 2 Ir. Com. Law Rep. 366.

shall "have been." In several of the sections retrospective words are introduced, as in the 10th and 16th; and the 104th section, which repeals the former Acts, leaves them unaffected, "so far as may be necessary to support or enforce any lease made, or contract entered into." In a great number of cases, the words "shall be," and "shall be deemed to be," have been held to have only a prospective operation: *Marsh v. Higgins* (a); *Jackson v. Woolley* (b); *Moon v. Durden* (c); *Thompson v. Lack* (d).

M. T. 1861.  
*Exchequer.*  
*M'ARBAVY*  
*v.*  
*HANNAN.*

*W. D. Andrews*, in reply.

The tenant is estopped, by the lease of the 13th of January 1831, from disputing the landlord's title. The recital of the mortgage cannot bind him; for that recital depends on the first recital, which recites a lease of premises on the east side of Cromac-street. That first recital being altogether erroneous, those that follow and depend on it are erroneous also; and we are entitled to treat the case as if they were struck out of the lease. With regard to the operation of the Landlord and Tenant Act, the question is, what was the intention of the Legislature? The preamble shows that it was intended to consolidate the existing law, and form a new code. The words "shall be deemed," where they first occur in the 3rd section, are enacting words, not words of futurity; and they must be read in the same way in the last clause of the section. It is said there are sections in the Act expressly retrospective. But, on the other hand, there are sections expressly prospective in their operation—sections 11, 16, 25, 26, 27, 28, 29 and 41 are so. Vested rights in the landlord are affected by the Act; for instance, by the 51st section; and why not also vested rights in the tenant?

He cited *Page v. Bennett* (e); *Crofts v. Middleton* (f); *Parke v. M'Loughlin* (g); *Bac. Ab.*, tit. *Leases*, O; *Litt.*, ss. 122, 479, 544.

*Cur. ad. vult.*

(a) 9 C. B. 551.

(b) 8 Ell. & Bl. 784.

(c) 2 Exch. 22.

(d) 3 C. B. 540.

(e) 2 Giff. 117.

(f) 2 K. & J. 194.

(g) 1 Ir. Com. Law Rep. 186.

H. T. 1862.

*Exchequer.*

M'ARREAVY

v.

HANNAN.

Feb. 15.

PIGOT, C. B.

Several matters have been discussed in the argument of this case. I shall state, shortly, the opinion which I have formed upon the material questions.

In my opinion, it is impossible to treat the lease of the 13th of January 1831 as operating as a demise, by estoppel, from Cooney the mortgagor, to Murray, the party purporting to take as lessee. If it had that operation, then, according to the recent case of *Cuthbertson v. Irving* (a), affirmed in the Exchequer Chamber (b), determining (contrary to an opinion which long prevailed) that the assignee of a reversion which exists only by estoppel is entitled to the benefit of the estoppel in like manner as the original lessors, the plaintiff would, I think, have been entitled to maintain the ejectment. But the lease recites that lands, of which the premises comprised in the lease or instrument of the 13th of January 1831 are expressly described as being a part, had been granted in mortgage to the Rev. William Wauchope, one of the joint grantors of the instrument of the 13th of January 1831; and the true title so appearing, it is perfectly clear, on old and recent authority, that there is no estoppel. The rule on that subject was declared in *Cuthbertson v. Irving*, and also in the recent case of *Pargeter v. Harris* (c). It was contended before us that it appeared, by the lease of the 13th of January 1831, that the premises mortgaged, and the premises comprised in the lease, were different premises, because the former are described as bounded on the *west* by Cromac-street, and the latter are described as having Cromac-street as their *eastern* boundary; that is, as situated on the west side of the street. The former boundary, however, is described as existing on the 1st of June 1829, the date of the head-lease from the Marquis of Donegal. The date of the mortgage is not stated. Between the date of the head-lease and that of the lease of the 13th of January 1831, the street may have been altered. The apparent discrepancy in the boundaries may be thus accounted for. And we are obliged, by the

(a) 4 H. &amp; N. 742.

(b) 6 Jur., N. S., 1211; S. C., 29 Law Jour., N. S., Exch., 485.

(c) 7 Q. B. 708.

terms of the lease of the 13th of January 1831, to treat the parties to that lease as precluded, by the positive statement in it, that the premises comprised in that lease were part of the premises comprised in the head-lease and the mortgage, from denying that they were. That being so, and the true title being shown, the case is reduced to the simple one of a lease by mortgagor and mortgagee, disclosing the title, and, consequently, pending the mortgage, operating, not as a demise by the mortgagor, but as the mortgagee's demise and the mortgagor's confirmation.

H. T. 1862.  
*Exchequer.*  
**M'AREAVY**  
 v.  
**HANNAN.**

That being the operation of the instrument, and there being no estoppel, another consequence follows, that the reservation of the rent to Cooney the mortgagor is, as a reservation, void. There is no reservation of the rent to the mortgagee. It is, therefore, simply, an expressed reservation to a stranger, having no estate in the lands. The powers of distress and entry for non-payment of rent, as well as the reservation of the rent itself, are to Cooney the mortgagor, his heirs and assigns. Cooney being a party to the lease, the words of reservation, coupled with the power of distress, operate as a grant, to him, of a rentcharge; and all the covenants with Cooney are covenants in gross. For these familiar propositions it is needless to refer to authorities; many of them are collected in the two cases I have cited. During a part of the argument, I was considering whether the reservation should be treated as void only in reference to the person to whom it was reserved, and, since it was a reservation during the term, good as a reservation to the owner of the *quasi* reversion—the mortgagee (who concurred in the demise), upon the principle stated in *Lord Nottingham's M.S. note* 115 to *Coke Litt.*, 213 *b*, and unfolded in the judgment of Lord Chief Baron Hale, in *Sacheverel v. Froggart* (a). But when the lease is inspected, it will be found impossible to uphold the reservation in that way. There is, as I have said, no reservation to the mortgagee. There is an express reservation, operating, together with the power of distress, as a grant of a rentcharge to the mortgagor. It is impossible to give to the lease a construction which would confer two rents, one by way of rentcharge, on the

(a) 2 Saund. 271; more fully reported in 1 Ven. 181.

H. T. 1862.

*Eschequer.*

M'AREAVY

v.

HANNAN.

mortgagor, the other by way of reservation, in the nature of a rent-service, on the mortgagee. It is needless to refer to other difficulties which, upon the face of this instrument, are opposed to any such mode of dealing with its contents. It appears, upon the face of it, that there was, in truth, no reversion to which a rent-service could be annexed by a reservation created, upon the principle of the authorities which I have mentioned, by operation of law, and carrying the rent to the owner of the reversion, by reason of the impossibility, in law, of giving it to a stranger. Although the statute 14 & 15 *Vic.*, c. 20, has taken away the necessity for a reversion, in order to maintain an ejectment for non-payment of rent, nevertheless, in construing the instrument by those rules of law which are drawn from the feudal incidents of tenure, and according to which the law will, if possible, give the rents or services to the proper party, the non-existence of a reversion would form a very material consideration. It is, however, unnecessary to pursue the matter further. It is, in my opinion, clear, that this reservation was wholly void; that the rent was a rentcharge; that the covenants were covenants in gross; that the conditions were reserved to a stranger to the estate; and that the lease conferred no right, irrespective of the late statute for the consolidation and amendment of the law of landlord and tenant, to maintain an ejectment for non-payment of rent. The plaintiffs, or either of them, representing the assignee of the mortgagor and mortgagee, acquired no right to maintain the ejectment. The mortgagee had not the rent, and the mortgagor had not the estate, and the assignee derived no title from either to maintain an ejectment for non-payment of rent, under the lease of the 13th of January 1831.

It was further argued, that the instrument of the 13th of January 1831 ought to be treated as an agreement for a holding of land under Bryan Cooney, within the 3rd section of the late statute, the Landlord and Tenant Law Amendment Act 1860, 23 & 24 *Vic.*, c. 154. My Brothers, I believe, are of opinion that it is not within that section. Upon the question whether the instrument is or is not within that section, I pronounce no opinion. In my

judgment, the 3rd section of that statute is not retrospective, and therefore would not apply to the instrument of the 13th of January 1831, even if that instrument were within the 3rd section. That section creates a new relation, perfectly distinct from that which existed before. It is clear to my mind, for the reasons which I stated upon the other parts of this case, that the relation of landlord and tenant did not exist between Cooney and Murray, under the instrument of the 13th of January 1831. That relation would be created for the first time by the statute, if this section applied to the case now before us. A change of that nature is a very substantial change in the relation of two parties. In the very case now before us, Hannan, the assignee of Murray, may have bought Murray's interest, on the faith of the existence of a certain condition of the law (affecting the title), which withheld from the grantors of the instrument of the 13th of January 1831 the right of bringing an ejectment for non-payment of rent. The exemption, which the law there sanctioned, from liability to a forfeiture of the estate by non-payment of the rent, imparted a substantial additional value to the interest purchased. There was a vested right to hold, exempt from that liability. This case, therefore, appears to me to afford a strong illustration of the wisdom of the rule, upon which the old maxim of law is founded, namely, that a statute ought not to be construed as retrospective, without a clearly expressed intention of the Legislature that it should so operate. The law upon this subject has been recently the subject of consideration in several cases. The general rule is stated in 2 *Inst.*, p. 292, by *Lord Coke*; and I do not think that the principle has been anywhere better expressed, in modern times, than in the judgment of Baron Rolfe in the case of *Moon v. Durden* (a). He says, "The general rule on this subject is stated 'by *Lord Coke*, in the 2nd *Institute*, p. 292, in his commentary 'on the Statute of Gloucester; '*Nova constitutio futuris formam imponere debet, non præteritis*;' and the principle is one of such 'obvious convenience and justice, that it must always be adhered 'to in the construction of statutes, unless in cases where there is

H. T. 1862.  
*Eschequer.*  
**M'AREAVY**  
*v.*  
**HANNAN.**

(a) 2 Exch. 22.

H. T. 1862.

*Eschequer.*

M'AREAVY

v.

HANNAN.

"something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." I have looked with great care over every section of this Act; and whatever construction may be given to some of the other sections which are not in terms retrospective, I can find nothing in *any* of those other sections indicating that retrospective operation ought to be given to this 3rd section. Is it clear legislation that this section, in its own terms, is retrospective? If not, upon the principle to which I have referred, we ought to give it a construction prospective, and not retrospective. The words are—"The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service." If the section had stopped there, the language might have been, perhaps, treated as importing prospective legislation. But it proceeds, "and a reversion *shall not* be necessary to such relation, which *shall be deemed*." I may observe that these very words "shall be deemed" have, in several cases, been determined to be not sufficient, in themselves, to give to an enactment a retrospective operation, as in *Hitchcock v. Way* (a); *Moore v. Phillips* (b); *Thompson v. Lack* (c). The section proceeds, "which shall be deemed to subsist in all cases in which there *shall be* an agreement by one party to hold land from or under another, in consideration of any rent." Those words, *prima facie*, seem to me to import that the relation is to be that which *shall be*, and not that which *is*. If the Legislature intended that the section should apply to contracts existing when the Act passed, they might have said, "when there is, or when there shall be." Since they have not adopted so obvious a mode of expressing a retrospective meaning, I think we ought not to construe the section by importing into it those words, or by construing it as if they intended what they could have easily expressed, but what they have abstained from expressing. In several sections (ss. 8, 10, 18), where the Legislature intended that the Act should be retrospective, as well as prospective, they have used retrospective with prospective words.

(a) 6 Ad. &amp; Ell. 943.

(b) 7 M. &amp; W. 536.

(c) 3 C. B. 540.

Further, the words "shall be" are more consistent with a prospective than a retrospective operation. But it would be enough that the legislation should be doubtful, to bring the case within the rule of construction laid down by *Lord Coke*, and applied in *Moon v. Durden*. That rule has been further recognised and applied in several recent decisions, particularly in *Williams v. Smith (a)*, and in a case which was a good deal considered, *Jackson v. Woolley (b)*. In the latter case, the Court of Queen's Bench, in deference to a decision of Vice-Chancellor Kindersley, in *Thompson v. Waithman (c)*, had determined that the 14th section of the Mercantile Law Amendment Act 1856 was retrospective; but the Court of Exchequer Chamber, referring to, and adopting, the principle laid down in *Moon v. Durden*, reversed that judgment. This is not a case in which the controversy arises upon a matter of procedure. A distinction has been lately taken, in some of the cases, as to the application of the rule, between statutes dealing with rights, and statutes dealing with procedure. Lord Cranworth, in his judgment in *Moon v. Durden*, does not seem to have thought of that distinction; for he plainly disapproved of the decision in *Towler v. Chatterton (d)*. It may indeed, perhaps, be with some color contended, that substantial rights may be as much affected by a statute dealing with procedure, and taking away all the means by which they can be asserted in a Court of Justice, as by a direct enactment expressly annulling the rights themselves. It is, however, unnecessary in this case to enter into any consideration of the distinction to which I have referred; for, in dealing with the 3rd section of the Landlord and Tenant Law Amendment Act, we are dealing with right and title, and not with procedure.

I am, therefore, of opinion that this Act, so far as relates to its 3rd section, ought to be prospectively construed. I was at first disposed to think that the 3rd section was intended as a prolongation of the interpretation clause (the 1st section), and as indicating a further definition of the words "landlord" and "tenant;" and

(a) 4 H. & N. 559; S. C., 29 Law Jour., Exch., 127; 5 Jur., N. S., 1107.

(b) 8 Ell. & Bl. 784.

(c) 3 Dr. 628.

(d) 6 Bing. 258.

H. T. 1862.  
*Exchequer.*  
**M'AREARY**  
 v.  
**HANNAN.**



H. T. 1862.  
*Exchequer.*  
**M'AREAVY**  
*v.*  
**HANNAN.**

that this was inserted in the form of a separate section, because it required more words than could be conveniently inserted in the interpretation clause, and required to be put into a different form of phrase from that usually employed in such a clause. But, on consideration, I am of opinion that the 3rd section cannot be so treated. We must take it as we find it—a distinct enactment, changing, if retrospective, existing rights, and creating, for the first time, new relations between parties who never stood in that relation towards each other before.

For all these reasons, I am of opinion that the points saved must be ruled in favor of the defendant.

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Observations of the CHIEF BARON, at the close of the delivery of the judgments :—

The result of this case, and of some of the decisions in this country and in England, is, that the safest course to be adopted, where it is intended that the mortgagor shall execute a lease which the mortgagee shall confirm, will be, that the mortgagor alone shall execute a demise, without any recital of title, to the intended lessee; and that the mortgagee shall confirm it by a subsequent separate deed (a).

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FITZGERALD, B.

In my opinion, the lease of January 1831 operated as a demise by Wauchope (the mortgagee), of the premises therein mentioned, to the lessee; and as a grant, by such lessee, of the rent which it professed to reserve to the mortgagor, Cooney. It was a covenant by the lessee to hold the land from Wauchope, and a grant by the lessee of the rent to Cooney, out of the estate which he took from Wauchope. The present defendant represents the interest of the lessee, and I assume that the plaintiff represents the immediate interests both of Wauchope and Cooney, in the reversion and rent

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(a) It may be found prudent, in order to avoid any question of estoppel created against the mortgagor, that he should not be a party to the second deed, showing the title of the mortgagor. See 2 Sm. Lead. Cas., 706, *et seq.*

respectively. The question is, whether, in that state of things, the plaintiff is entitled to maintain ejectment for non-payment of rent? I think that, supposing the Act applies at all to a contract made in the year 1831 (a point on which I wish to be understood as expressing no opinion whatever), the case before us is still not within the Act. To sustain the ejectment, the relation of landlord and tenant must, within the meaning of the Act, subsist between the plaintiff and the defendant. Whether it does so subsist or not depends on the question whether such a relation was created between Cooney or Wauchope, or both of them, and the lessee in the lease of 1831? The 3rd section of the Act is in these terms:—"The relation of landlord and tenant shall be deemed "to be founded on the express or implied contract of the parties, "and not upon tenure or service; and a reversion shall not be "necessary to such relation, which shall be deemed to subsist "in all cases in which there shall be an agreement by *one party* "to hold land from *another*, in consideration of any *rent*." What the legal operation of a contract is, we must still determine, in the first instance, by the law as it existed previous to the statute. But the statute having done away with the necessity of a reversion, in the constitution of the relation of landlord and tenant, I agree that though the rent, which is the consideration of the contract, be in law a rentcharge, it will not therefore follow that the relation of landlord and tenant will not subsist. But I think it is equally plain that it must be a rent payable to the party from whom the land comes. An agreement by *one party* to hold land from another, in consideration of any rent, includes only the case of a rent payable to him from whom the land comes, though that may be either rent-service or rentcharge. In this case, no rent being payable to Wauchope, from whom the land came, and no legal interest in the land passing from or being contracted for with Cooney, to whom the rent is payable, the relation of landlord and tenant, contemplated by the Act, did not, in my opinion, subsist between Wauchope or Cooney, or both of them, on the one side, and the lessee on the other.

H. T. 1862.  
*Exchequer.*  
**M'AREAVY**  
*v.*  
**HANNAN.**

H. T. 1862.

HUGHES, B.

*Eschequer.*

M'AREAVY

v.

HANNAN.

I am of opinion that the plaintiff in this case is not entitled to maintain ejectment for non-payment of rent; but I give no opinion as to whether or not the 3rd section of the Landlord and Tenant Law Amendment Act has a retrospective effect.

DEASY, B.

I concur with my Brothers FITZGERALD and HUGHES; and I also give no opinion as to the effect of the 3rd section of the recent statute upon existing contracts.

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MOOHAN v. BLOOMFIELD.

Jan. 24.

Where, at the trial, there is a verdict for the defendant on several of the issues joined, and a verdict for the plaintiff, with damages, on another issue, a summary of the judgment which omits the judgment for the defendant on the issues found for him is irregular, and will be amended.

THIS was an application, on behalf of the defendant, that the judgment entered in this cause by the plaintiff, on the 22nd day of July 1861, and numbered 66 on the roll of Hilary Term 1861, might be amended, by setting out the pleadings and issues in said cause, and by making the judgment in accordance with the *postea*; in this, that judgment be entered for the defendant, on the first, second, third and fourth issues in said cause.

It appeared that the summons and plaint in the action had contained three counts or paragraphs—one for trespass to the plaintiff's close, one for assault and battery, and one for malicious prosecution. The defendant pleaded two defences to each count, and upon which issues were joined. First.—Whether the close, soil, grass and sods, in the first count mentioned, were, or was any of them, the close, soil, grass and sods of the plaintiff?

Secondly.—Whether the defendant committed the supposed trespass or grievances, in the first count mentioned, or any of them?

Thirdly.—Whether the defendant committed the supposed trespasses, in the second count mentioned, or any of them?

Fourthly.—Whether the second defence to the second count **H. T. 1862.**  
is true in substance and in fact? *Exchequer.*

There were two other issues framed upon the count for malicious prosecution, and the defences thereto.

**MOOHAN**  
**v.**  
**BLOOMFIELD**

At the trial, the plaintiff recovered a verdict for £10, upon the issues framed, upon the count for malicious prosecution; and upon the first, second, third and fourth issues, there was a verdict for the defendant.

Another action having been brought by the same plaintiff against the same defendant, the defendant sought to plead that one of the causes of action therein was the same as one of those in the former action, to which defence had been taken, and on which a verdict was had for the defendant, and to rely on the judgment in that action as an estoppel; but, on an examination of the summary of the judgment, it was ascertained that it omitted to state the findings for the defendant on the four first issues, and was in fact a general verdict for the plaintiff. The form of the summary as filed was as follows:—

<p>“Patrick Moohan, Plaintiff; John Caldwell Bloomfield, Defendant. County of the city of Dublin.”</p>	}	<p>“Patrick Moohan, the plaintiff, by “Patrick Brady, attorney, issued a writ “of summons and plaint, on the 25th “day of May 1860, directed to John “Caldwell Bloomfield, the defendant, requiring him to appear in the “Court of Exchequer, to answer the complaint of the said plaintiff, “for the recovery of damages for trespass on plaintiff’s close; also “for an assault and battery; also for a maliciously prosecuting the “plaintiff, and causing a certain false information to be sworn by one “Daniel Murray, and causing and procuring a warrant to issue, “under which the plaintiff was arrested and imprisoned; and the “said writ was filed on the 6th day of June 1860; and the “defendant having taken defence to said action, on the 30th of “June 1860, a trial was held at the Court of Exchequer, Dublin, “on the 17th day of December 1860, before the Right Honorable “David Richard Pigot, Lord Chief Baron of the said Court, and “a special jury; and a verdict was had for the plaintiff, for the</p>
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H. T. 1862. "sum of ten pounds, together with sixpence expenses and costs.—  
*Exchequer.* "PATRICK BRADY, attorney.  
 MOOHAN "Therefore, it is considered by the Court of Exchequer that the  
 v. BLOOMFIELD "said Patrick Moohan, the plaintiff, do recover against the said John  
 "Caldwell Bloomfield, the defendant, the sum of ten pounds, with  
 "sixpence for his costs, as found by the jury aforesaid, together with  
 "——— for costs of increase, making together the sum of £———"  
 The present motion was then instituted.

*R. Dowse*, in support of the application, referred to the 124th section of the Common Law Procedure Act 1853.

*J. P. Hamilton*, contra.

PIGOT, C. B.

We think that this motion must be complied with.

The vice in the present record, or document on the file, is this:— the summons and plaint contained several counts or paragraphs— one for trespass to land—one for assault and battery, and one for maliciously causing the plaintiff's arrest. To this there were several defences. With respect to one count, the plaintiff had a verdict, and obtained damages to the amount of £10. As to the defences to the other counts, there were findings for the defendant upon the issues joined. The summary brought in by the plaintiff's attorney contained nothing except a short statement of the counts of the plaint, and then a statement that the defendant "took defences to the action;" that a "trial was held," and that "a verdict was had for the plaintiff for £10, together with sixpence costs." There was no summary of the defences, or of the issues, or of the findings; and upon that document there were really no elements upon which an accurate judgment could be entered. What was the obligation of the attorney, and what was the obligation of the officer, under the 124th section of the Common Law Procedure Act? That section enacts, "When it shall be required to sign any judgment, the "attorney requiring the same shall deliver to the proper officer a

*“correct summary or recital of the proceedings, briefly stating the several pleadings, and the nature thereof.”* What are the proceedings of which he is to give a summary? The proceedings up to the time at which he delivers the summary, namely, the plaint, the defences, the issues and the findings. It is important that the summary should comprise a brief statement of all; because it appears very plain, from the subsequent parts of the section, that one of the purposes for which the summary is prepared is, to furnish the officer with the means by which he shall be able to refer to the pleadings, and to test the correctness of the summary, by a reference to those pleadings themselves. If (as in the present instance) two actions are pending between the same parties, the officer may be exposed to much difficulty, and the proceedings may be involved in perplexity and confusion, unless they are so described in the summary as to enable the officer, in looking for them on the files of the Court, to distinguish them from those in any other action. The attorney having given the summary, “Thereupon the officer shall take off, from the pleadings file, the several pleadings in the cause in which such judgment shall be required to be made up, and shall place them, together with the said summary prefixed, in consecutive order upon the file of judgments, in the manner now used, or as may be hereafter directed by any General Order of the Judges, there to be kept as the permanent record of the Court; and shall, upon the said summary, give the proper award of judgment.” What is the proper award of judgment? It is not prescribed by the statute, but it existed at Common Law; and, not being altered by statute, must be still as it was before the statute was passed. The proper award of judgment for the plaintiff is *quod recuperet*, “that he do recover” his debt and damages (or his damages), together with his costs of increase, according to the statute; and then, if he seeks execution, an award of execution follows. What is the proper form where the judgment is for the defendant? It is in effect the same, whether there be one count or several. If the findings for the defendant dispose of the whole action, the judgment is, that the plaintiff shall take nothing by his writ, and that the defendant be acquitted, and “*eat*

H. T. 1862.

*Exchequer.*

MOOHAN

v.

BLOOMFIELD

H. T. 1862.  
*Exchequer.*

MOOHAN  
v.

BLOOMFIELD

*sine die*," that he do go thereof without day. If there be several counts, and the findings for the defendant do not dispose of the action, but there are findings, as to one count, for the plaintiff, and, as to another, for the defendant, the judgment for the plaintiff will be, that he do recover his debt (or his damages), together with his costs of increase ; and for the defendant, as to the matter of which he is acquitted, that he go thereof without day. It is, therefore, important for the officer, in order to enable him to perform his duty with convenience, despatch and certainty, as to the pleadings and proceedings with which he has to deal, that the summary, however briefly it may be framed, shall present a "correct" statement of the defences and the findings. It is not necessary that there should be a full abstract of those defences and findings. A very short statement may, with a very little expenditure of care in the professional man who knows the pleadings and proceedings, be quite sufficient to indicate to the officer what have been those "proceedings" up to the time when the summary is delivered to him. This is the more necessary, because the summary, enrolled, is, under the Act, the only record of the judgment, unless the entire proceedings are enrolled, with a view to a writ of error. The 124th section proceeds to provide :—"And it shall, in all cases of enrolling judgments, be sufficient to place upon the roll a correct copy of the "said summary or recital of the proceedings, according to fact, "together with the award of judgment, *in proper form*, with a "reference to the original pleadings on the judgment files, whereby "the same may be *immediately* found and inspected." Thus the summary, so enrolled, is made by the statute an index to the pleadings on the file ; and, unless there be a writ of error, the summary, so enrolled, will, for all ordinary purposes, constitute a sufficient record. But the Act provides for another case, in which there must be entered on the record, for the purposes of being taken to the Court of Exchequer Chamber, in order to be inspected and used there (section 176), the entire of the pleadings, or such parts of them as shall be required for the purpose of the writ of error. The 124th section proceeds to provide :—"Provided always, that "if it shall be deemed necessary, for the prosecution of any pro-

“ceeding in error, or for any other purpose, it shall be lawful  
 “for the Court to order that the whole, or any part, of the plead-  
 “ings shall be transcribed upon the roll, and the same shall be  
 “transcribed by the proper officer accordingly.” What appears  
 then to me to be plainly required by the 124th section of the  
 Act is this—the attorney is to deliver to the officer a “correct  
 summary” of the proceedings, “briefly stating the several plead-  
 ings in the cause.” The officer is to receive that summary, and  
 find and inspect the pleadings, and of course the *postea* (which  
 is a part of the proceedings); and, in the performance of this  
 duty, an incorrect summary must have a tendency to delay, impede  
 and mislead him. The Legislature gave to the suitor the double  
 protection—first, of the attorney, who ought to be acquainted with  
 the proceedings of which he is required to deliver a summary to  
 the officer; and, secondly, of the officer, who is to inspect the  
 proceedings shown upon the summary. But that imposes upon  
 the officer the duty not merely of taking the summary from the  
 attorney, but also of looking for the pleadings, which may involve  
 replications and demurrers—a duty, for the performance of which  
 with convenience, with accuracy and with despatch, it is important  
 that he should know, clearly and plainly, *for what* he is to search.  
 It appears to me that the summary ought to furnish him with the  
 means of so searching; and that the duty prescribed by the statute  
 for the attorney is violated when he does not give that complete,  
 though brief, summary which the Act requires, in directing him  
 to deliver to the officer “a correct summary or recital of the pro-  
 ceedings.” The object of the present motion is to enable the  
 defendant, sued in a third action by the same plaintiff, to plead,  
 as a defence, that one of the causes of action in the second of  
 the two former suits (in which this summary was filed) was the  
 same as that for which the plaintiff is now suing in a third  
 action; that, in the former suit, there was a defence to that cause  
 of action, and a verdict was had for the defendant on the issue  
 upon that defence; and that, upon that verdict, the defendant, as  
 to that cause of action, had judgment. Such verdict, followed by  
 such judgment, if properly pleaded, would estop and preclude the

H. T. 1862.

Eschequer.

MOOHAN

v.

BLOOMFIELD



H. T. 1862. Exchequer.  
 MOOHAN  
 v.  
 BLOOMFIELD

plaintiff from recovering in this action for the same cause. But, in order to plead such a defence, there must be a judgment founded on the verdict; and neither can be available, unless it also appears that the causes of action were the same. This summary gives not the slightest intimation of any finding, in reference to the cause of action in question; and not only does it contain nothing upon which a judgment could have been founded for the defendant, but what it does contain states, contrary to the fact, a general verdict for the plaintiff—which, if it warranted a judgment at all, could warrant only a general judgment for the plaintiff. The defendant is, of course, plainly entitled to have this rectified, by making the summary conformable to the pleadings and proceedings in the cause.

A great mistake has occurred in the preparation (or at all events in the use) of the printed forms upon which summaries have been prepared, some of which we find upon the office file. The form in the present case appears to have been prepared upon parchment, and to be suited to the case of a single count, or of a single defence to all of several counts, and a general finding for the plaintiff. There is no room in the form for the introduction of any but the shortest pleadings. It is plain that the forms ought to be prepared with a view to the very different exigencies of various cases, and that the present form ought not to be used where the proceedings are too voluminous or complicated to be placed upon it.

The attorney for the plaintiff was manifestly misled by the forms, and by a mis-practice which seems to have prevailed in the office, possibly originating in the general adoption of these forms. I have not the least doubt that he was wholly unaware that the summary was wrong. It is not a case for making the plaintiff pay the costs of the motion. We find several similar erroneous summaries on the file.

E. T. 1862.

Exchequer.

## PRENDERGAST v. LORD PLUNKET.\*

May 1, 12.

THIS was an action of trespass *quare clausum fregit*. The defendant pleaded a denial of the committing of the trespass; secondly, that the land was not the land of the plaintiff; and, thirdly, a plea of *liberum tenementum*, that, at the time of the alleged trespass, the land was the soil and freehold of the defendant. A motion was now made, on behalf of the plaintiff, to set aside this third defence.

In an action of trespass to land, the plea of *liberum tenementum* will not, as a general rule, be allowed, and, if pleaded, will be set aside.

*M. Morris*, in support of the application.

The plea of *liberum tenementum* is embarrassing, and ought not to be permitted to stand, at all events where there is already on the record a plea denying that the close is the close of the plaintiff. In the Court of Common Pleas, such a plea is never allowed. Although sanctioned by usage, it was always considered an anomalous plea, and unsustainable on principle. In England, the Courts still allow it to be pleaded; but there is no section in the English Common Law Procedure Act analogous to the 48th section of our Act, which enacts that there shall be no pleading after the defence, unless by the special leave of the Court, and unless the real questions of fact or law cannot conveniently be raised and put in issue by an amendment of previous pleadings. The object of the plea of *liberum tenementum* was to drive the plaintiff to a replication, which is the very thing the 48th section was intended to prevent. Every defence open under it is open to the defendant, under the traverse of the close being the close of the plaintiff; for it has been expressly decided that that plea puts in issue both the title to the possession, and the actual possession: *Jones v. Chapman* (a); *Slocombe v. Lyall* (b).

(a) 2 Exch. 803.

(b) 6 Exch. 119.

\* Before the Full Court.

E. T. 1862.

*Exchequer.*PRENDER-  
GAST

v.

PLUNKET.

*J. Robinson and H. Concannon, contra.*

The only question is, whether this defence is embarrassing, under the 83rd section? It is sanctioned by precedent in this Court, and is constantly pleaded in England under the same code as our Common Law Procedure Act. The principle on which it is founded is, that it admits such a possession in the plaintiff as would enable him to maintain the action against a wrongdoer, but asserts a freehold in the defendant, with a right to the immediate possession: *Ryan v. Clark* (a); *Morse v. Apperly* (b).

*Cur. ad vult.*


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 FIGOT, C. B.

May 12.

In this case of *Prendergast v. Lord Plunket*, we allowed the motion to stand over, to enable us to ascertain what had been done in the Court of Common Pleas, in reference to pleas of *liberum tenementum*; and we have ascertained that that Court will not allow such a defence under any circumstances, or at least as a general rule. And, on consideration, we have come to the conclusion that, subject to the limitations I shall now mention, we ought to adopt a similar practice. Hitherto, in this Court and in the Court of Queen's Bench, it has been frequently pleaded. In England it is constantly pleaded; and, therefore, it appears to me that we cannot, merely because another Court has come to the conclusion that it will not allow this defence, set it aside in the present instance. But we announce now to the Bar, that we shall not allow it for the future.

The plea is in form and substance a good plea in point of law. It has been called an anomalous plea, because it is a departure from the rule that, in a plea of a freehold estate, the precise estate must be stated. It has been sometimes objected to on the ground that it does not give color, and that it is an argumentative denial of the trespass. It admits a possessory right in the plaintiff, which would entitle the plaintiff to maintain an action against a wrongdoer, while it answers it by showing that the defendant entered upon his own land, although that land was in the possession of

(a) 14 Q. B. 71.

(b) 6 M. &amp; W. 145.

the plaintiff. But the object of it must be considered by reference to what has been determined. The grounds upon which I think it ought not to be allowed arise upon a consideration of the 48th and 83rd sections of the Common Law Procedure Act 1853. The 48th section enacts, that "There shall be no further pleading after the defence, except a demurrer to the defence, or a replication to a defence of set-off, or plea of matter occurring subsequently to the commencement of the action, unless by the special leave of the Court or a Judge, on an application to allow such further pleading; which shall only be allowed in case the real question or questions, whether of fact or law, between the parties, cannot conveniently be raised and put in issue by the amendment of the previous pleadings." Then the 83rd section provides that, "If any pleading or demurrer be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or a Judge shall make such order respecting the same, and also respecting the costs of the application, as to such Court or Judge shall seem fit." The object of the plea of *liberum tenementum* is a well-known thing. One purpose is, where the allegation in the declaration with reference to land is general, to compel the plaintiff to new assign, by setting forth the land by abutments. That purpose can be answered by the amendment of the plea, requiring the plaintiff to specify them particularly. Another object is to compel the plaintiff, if he relies upon any other answer to the plea of *liberum tenementum*, than a denial of the defendant's title, to set forth the title under which he derives. If the plaintiff goes to trial upon a traverse of the plea, and if the defendant proves that he has any soil in which he has a freehold estate in possession, reversion or remainder, the plaintiff would fail; and, in order to avoid that result, the plaintiff, if the lands are generally stated, must specify them, and specify what title he has. The consequence is, that if the plaintiff relies upon having himself, or being entitled under some one to, a term of years, he is driven to set forth that in his replication, and the defendant must answer by way of rejoinder. In the great majority of cases,

E. T. 1862.

*Eschequer.*

PRENDER-

GAST

v.

PLUNKET.

E. T. 1862.

*Exchequer.*

PRENDER-

GAST

v.

PLUNKET.

all these objects can be attained by an amendment of the previous pleading. Upon a simple traverse of the lands being the lands of the plaintiff, the defendant is entitled to prove, upon the issue joined on that defence, either that the land is his own, or that he has an estate which gives him a possessory title, or that it is the soil of another, and he is entitled to use it. There was a conflict of authority, in England, between the Courts of Queen's Bench and Exchequer, as to the effect of this plea; but in *Jones v. Chapman* (a), the Court of Error held that the defence put in issue both the possession and the title. The result is, that every advantage that can be gained by the plea may be gained by amendment of the pleading. Cases may, notwithstanding, arise where a question of law may be more conveniently tried by having a plea of *liberum tenementum*, or a replication, than by an amendment of the pleading. This case may arise—a person who has a freehold interest may be sued for entering upon land which he claims as his own. A person may get into possession, and he may be ignorant of that person's claim of title; he may know that he has his own title-deeds, and has long enjoyment, but be ignorant of the other's title. I think, if the defendant shows that case, he may fairly require that the pleading should be so moulded as to let him know what he has to meet.

Again, it might be a proper plea in cases where the defendant knows the title. He may know that the defendant relies upon a deed, or upon a lease which has expired, upon the true acceptance of its terms, or upon a lease which contains no demise; and if the defendant shows that there is such an instrument, and that it would be more convenient that the defendant should demur, I can conceive that that would be, so far from being an embarrassing course, under the 83rd section, the most convenient course.

I would, therefore, say that, in an exceptional case of that kind, the plea of *liberum tenementum* would be a proper plea.

That, however, is a case which will rarely arise; and it appears to me that, as a general rule, we should not allow this plea, certainly not along with the traverse of the close being the close of the plaintiff; and that, following the practice in the Common Pleas,

(a) 2 Exch. 803.

we ought, upon the mere face of the plea, unless some reason such as I have stated be shown, set aside the plea as embarrassing.

I have thought it right to give those reasons, since we are dealing with a plea which is an established form of pleading in England, where there is a Common Law Procedure Act nearly the same as in this country.

In the case now before us, we cannot treat the plea as ambiguous upon the face of it, because it is pleaded in accordance with the ordinary practice of the Court; but we can provide for future cases.

E. T. 1862.  
*Exchequer.*  
PRENDER-  
GAST  
v.  
PLUNKET.

Order.—It is ordered by the Court that this motion do stand refused, the said defendant hereby consenting to withdraw the said third defence to the first paragraph, and that the said defence be struck out of the record accordingly.

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DEXTER v. CUST.

M. T. 1861.  
Nov. 12, 13,  
14.  
H. T. 1862.  
Feb. 15.

This was an action for the disturbance of the plaintiff in his office of public weighmaster of butter for the town of Tipperary.

The power  
given to Magis-  
trates at Quar-  
ter Sessions,

by the 2nd section of the 52 G. 3, c. 134, to appoint a weighmaster of butter, is exercisable by them since, as well as before, the 1st of March 1813.

The plaintiff, a candidate for the office of weighmaster, obtained, for the sum of £5, a surrender of the office from the then holder, who was advanced in life, and had ceased to discharge the duties. The Justices at Quarter Sessions acted on this, and appointed the plaintiff.

The appointment of the plaintiff was put in issue at the trial—

*Held*, that the Judge was not bound to nonsuit the plaintiff, or direct a verdict for the defendant, under the 11th section of the 52 G. 3, c. 134.

It is not a condition of the validity of the appointment that the oath and bond, mentioned in the 6th section of the 52 G. 3, c. 134, should be taken and perfected at the same Sessions at which the appointment is made.

The opening, by the defendant, of a weigh-house near that of the plaintiff, and the weighing of butter there for the public, at like fees as those prescribed by the statute to be taken by the plaintiff, and the holding out of inducements to the public to resort to such weigh-house (such acts resulting in a loss of profit to the plaintiff), amount to a disturbance of the plaintiff in his office of weighmaster of butter, under the 52 G. 3, c. 134, though the defendant may not have "assumed" the office of

M. T. 1861.      The summons and plaint, in its first paragraph, complained that  
*Exchequer.*  
 DEXTER  
 v.  
 CUST.  
 before and at the passing of the 52 G. 3, the town of Tipperary was a market town wherein butter was bought and sold, and exposed to sale; and that the plaintiff was duly appointed pursuant to said Act, and the other statutable enactments in that behalf, such public weighmaster of butter for said town; and was lawfully possessed of the office and entitled to the fees and emoluments appertaining thereto; and that the defendant, within the said town, exercised the office of public weighmaster of butter, and took divers fees, &c., and thereby disturbed the plaintiff in said office.

The second paragraph averred that the plaintiff was possessed of the office, and complained that the defendant, without any lawful authority, opened a public weigh-house for the weighing of butter in the market-town of Tipperary, and took therein certain fees, viz., two-pence for each firkin of butter weighed therein, whereby the plaintiff lost divers gains, &c.

The third paragraph complained of a disturbance of the plaintiff in his office, by means of threats and intimidation used by agents of the defendant, whereby customers were deterred from resorting to the plaintiff's weigh-house.

The fourth alleged a like disturbance by means of placards and advertisements, whereby customers were enticed away from the plaintiff's weigh-house.

The fifth complained of a general wrongful disturbance.

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the plaintiff "as such," nor done acts which the plaintiff was exclusively privileged to do under the statute; and though the defendant's acts were not in themselves deceitful, wrongful or violent.

The damages in such an action are not limited to the amount of actual loss of profits sustained by the plaintiff.

The town of Tipperary is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61.

The 6th section of the 52 G. 3, c. 134, enacts that every weighmaster, before he enters on the execution of his office, "shall take and subscribe before, &c., the oath following."

In the form of oath given by the statute, the weighmaster is to swear to the faithful performance of his duties "during the time I shall *continue* in said office." In the oath actually taken by the plaintiff, which in other respects literally followed the form, the words were "during the time I shall *hold* said office."

*Held*, that the form was sufficiently complied with; *per* PICOT, C. B., and HUGHES, B.

But *Held*, *per* FITZGERALD and DEASY, BB., that the words "continue in" were part of the oath, and that their omission was fatal.

The sixth was for money had and received.

The defendant pleaded, as to the first count, that the plaintiff was not duly appointed, pursuant to any Act or Acts of Parliament, public weighmaster of butter of the town of Tipperary, and that he was not lawfully possessed of the office, nor entitled to the fees appertaining thereto.

The second defence to the first count was a traverse of the exercise of the office.

The third defence pleaded to the second, third, fourth and fifth counts, traversed the plaintiff's possession of the office.

The fourth, fifth, sixth, seventh, eighth and ninth defences traversed the disturbance as alleged in the several counts of the plaint.

The tenth defence, which was pleaded to the first five counts, alleged that the plaintiff did not perfect a bond, with sufficient security, to the Justices of the Peace of the county of Tipperary; and did not take and subscribe before the said Justices, the oath in that behalf prescribed by the statute in the said first count mentioned; and did not file or lodge, or cause to be filed or lodged, such bond and oath in the office of the Clerk of the Peace of the said county.

The 11th defence, and a replication thereto, raised the question whether Tipperary was a place of export from whence butter was commonly shipped, within the 7 & 8 G. 4, c. 61? but this point was abandoned by the defendant's Counsel on the argument.

The twelfth defence was a traverse of the sixth count.

The case was tried before O'Brien, J., at the Spring Assizes of 1861, for the county of Waterford.

The plaintiff proved his appointment by the Justices at the October Sessions of 1859; and the resignation of one Mansergh in his favor, in consideration of a sum of £5. He further proved the oath taken by him, and admitted that such oath was not taken until the April Sessions of 1860. He also proved Acts of alleged disturbance. The evidence on those several matters is so fully detailed in the LORD CHIEF BARON's judgment as to render any statement of it unnecessary.

At the close of the plaintiff's case, the defendant's Counsel called

M. T. 1861.

*Eschequer.*

DEXTER

v.

CUST.



M. T. 1861. upon the learned Judge to nonsuit the plaintiff or direct a verdict  
*Exchequer.* for the defendant, upon the ground, first, that under the 52 G. 3,  
 DEXTER c. 134, the appointment of weighmaster was not vested in the  
 v. Magistrates, but in the Lord Lieutenant.  
 CUST.

Secondly, because the resignation of Mansergh was invalid.

Thirdly, because, though the appointment of the plaintiff was in October 1859, the bond and oath were not perfected and taken before the same Justices, nor until the Sessions of April 1860.

Fourthly, because the oath taken was not in conformity with the form given in the 52 G. 3, c. 134, s. 6.

The learned Judge refused to comply with this requisition.

It was also contended that Tipperary was a place of export from whence butter was commonly shipped for exportation, within the meaning of the statutes, and that the defendant was entitled to a direction upon the issue raising that question.

This direction the learned Judge refused to give.

The course of the trial, with reference to the question of disturbance and the damages, is fully stated in the LORD CHIEF BARON's judgment.

The jury found for the plaintiff on all the issues, except the fifth, and so much of the seventh as related to the third paragraph of the plaint, as to which they found for the defendant; and they assessed the damages separately, on the first principle stated in the learned Judge's direction to £149. 6s., and upon the second to the sum of £350.

Liberty was reserved to the defendant to move to reduce the verdict by that sum.

*C. Rolleston*, having, in Easter Term 1861, obtained a conditional order that the judgment should be arrested; or that the verdict for the plaintiff should be set aside, and instead thereof a nonsuit or verdict for the defendant entered, or for a new trial on the ground of misdirection, or that the damages should be reduced pursuant to leave reserved—

*R. Armstrong*, *C. H. Hemphill* and *C. Tandy*, showed cause. They contended—

1.—That the appointment of the plaintiff by the Magistrates at

Quarter Sessions was valid under the 52 G. 3, c. 134, s. 2, and that the appointment was not in the Lord Lieutenant, though made after the 1st of March 1813.—[It was admitted by the defendant's Counsel that this point had been so decided in the unreported case of *Hudson v. Mahony*.]

M. T. 1861.  
Exchequer.  
 DEXTER  
 v.  
 CUST.

2.—That the the appointment was not vitiated by the circumstance that the oath and bond were not taken and perfected until the April Sessions of 1860, though the appointment was in October 1859; that the word "wherein," in the 6th section of the 52 G. 3, c. 134, referred not to the words "county Sessions," but to the words "city, town corporate and county;" and that, even if that were not so, the appointment remained good, but the exercise of the duties of the office was suspended until the weighmaster had complied with the requisitions of the section, and that the payment of the £5 to Mansergh did not vitiate the plaintiff's appointment.

3.—That the oath taken was sufficient, the variance from the statutable form being immaterial, and words clearly synonymous being used.

4.—That as the plaintiff held a freehold office, to which duties were annexed by statute, and penalties for the non-performance of them, the mere fact of the defendant opening a weigh-house for the public, near that of the plaintiff, and taking the same fees to which the plaintiff was entitled, and inducing the public to leave the plaintiff's weigh-house, and thereby causing a diminution of his profits, amounted in law to a disturbance of the plaintiff in his office.

5.—That the jury were at liberty to give damages for loss sustained by the plaintiff, beyond the loss of profits proved, inasmuch as the action was founded upon a wrong done, and it was impossible to ascertain the precise measure of damages; and the defendant's conduct was systematically oppressive and offensive.

They cited *Mountcashell v. O'Neill* (a); *The Lancaster and Carlisle Railway Company v. Heaton* (b); *Regina v. Milner* (c);

(a) 5 H. of L. Cas. 937; S. C., 4 Ir. Com. Law Rep. 345;

2 Ir. Com. Law Rep. 436.

(b) 8 Ell. & Bl. 952.

(c) 3 Dowl. & L. 128.

M. T. 1861. *The King v. The Inhabitants of Corfe Mullen* (a); *Duke of Leeds v. Earl of Armherst* (b); *Shadwell v. Hutchinson* (c); *Williams v. Currie* (d); *Blofield v. Payne* (e); *Keeble v. Hickeringill* (f); *Weller v. Baker* (g); *Wells v. Watling* (h); *Emblen v. Myers* (i); *M'Mahon v. Leonard* (k); *Prince v. Lewis* (l); *Hudson v. Mahony* (m); *Dexter v. Hayes* (n).

*Exchequer.*  
DEXTER  
v.  
CUST.

*C. Rollestone, J. E. Walshe and Edward Johnstone, contra.*

They argued—

1.—That the appointment of the plaintiff was bad, as the bond had not been given until April 1860, six months after the appointment; that the word “wherein,” in the 6th section, referred to the last antecedent, “Sessions,” and that the object of the Act was, that the public should have the security for the performance of the duties from the moment the appointment was made.

2.—That the surrender of Mansergh’s office for a consideration was invalid, under the 11th section of the 52 G. 3, c. 134.

3.—That the words “continue in” were part of the oath prescribed by the Act to be taken *in hæc verba*, and that their omission was fatal.

4.—That the office of the plaintiff was not a franchise, and that he had no exclusive privilege of weighing butter; that the only thing which the plaintiff, under the statute, had an exclusive right to do was, to stamp a statutable approbation on the butter casks, and give a ticket to that effect. That defendant was not shown to have done this, nor to have held out to the public that his tickets had the same statutable effect as the plaintiff’s; and that, as all his acts were perfectly legal, the fact of loss resulting from them to the

(a) 1 B. & Ad. 211.

(c) 2 B. & Ad. 97.

(e) 4 B. & Ad. 410.

(g) 2 Wils. 414.

(i) 30 Law Jour., Exch., 71.

(l) 5 B. & C. 363.

(b) 20 Beav. 239.

(d) 1 C. B. 841.

(f) 11 East, 574 n.

(h) 2 Wm. Bl. 1233.

(k) 6 H. of L. Cas. 970.

(m) Not reported.

(n) 11 Ir. Com. Law Rep. 106.

plaintiff gave him no right of action. It was *damnum absque injuriâ*, M. T. 1861.  
unless such acts were done maliciously, forcibly and violently.

5.—That the actual loss of profits was the proper measure of damages.

They cited *The King v. Jefferies* (a); *Lovelace v. Curry* (b); *Hatton v. Williams* (c); *Pickard v. Bretts* (d); *Collins v. Hungerford* (e); *Young v. Hichens* (f); *Lawson v. The Bank of London* (g); *Lumley v. Gye* (h); *The Collins Co. v. Brown* (i); *Calcraft v. West* (k); *Rogers v. Dutt* (l); *Hamblin v. The Great Northern Railway Company* (m); *Knight v. Egerton* (n); *Miller v. Salomons* (o); *Broom's Legal Maxims*, p. 185.

*Cur. ad vult.*

PIGOT, C. B.

This action was brought to recover damages for a disturbance of the plaintiff in the office of weighmaster of butter in the town of Tipperary, which office he claimed to hold by an appointment under the 52 G. 3, c. 134.—[His Lordship stated the pleadings.]—It appeared, upon the plaintiff's evidence, that, from the year 1852, he had acted as butter weighmaster without any appointment. It further appeared that, some time before the Quarter Sessions of October 1859, a person of the name of Mansergh, who had been appointed weighmaster of butter, in July 1827, but who was advanced in life, and had not acted for many years, executed an instrument, the loss of which was proved, and of which only so much of the contents appeared in evidence as showed that it purported to be a "surrender" or "giving up" of the office of weighmaster, in consideration of £5. It did not appear that the instrument stated by whom the £5 was paid, or to whom the office was surrendered. But it appeared, on the evidence of the plaintiff,

H. T. 1862.  
Feb. 15.

(a) 4 T. R. 767.

(c) 7 Ell. & Bl. 94.

(e) 2 Ir. Jur., N. S., 519.

(g) 18 C. B. 95 n.

(i) 3 K. & J. 423.

(l) 3 L. T., N. S., 160.

(n) 7 Exch. 407.

(b) 7 T. R. 631.

(d) 29 Law Jour., Exch., 18.

(f) 6 Q. B. 606.

(h) 2 Ell. & Bl. 216.

(k) 8 Ir. Eq. 74.

(m) 2 Jur., N. S., 1122.

(o) 7 Exch. 475; S. C., 8 Exch. 778.

H. T. 1862.  
Exchequer.  
 DEXTER  
 v.  
 CUST.

that the sum of £5 was paid by him. It further appeared that this instrument of surrender or resignation was produced before the Court of Quarter Sessions, on the occasion of the plaintiff's appointment in October 1859. At those Quarter Sessions, the plaintiff was appointed by the Magistrates there assembled. The oath and security required by the 52nd G. 3, c. 134, were not perfected by the plaintiff until the Quarter Sessions of April 1860, when an oath was taken by him, and security by bond was entered into. The statute 52 G. 3, c. 134, s. 6, requires that the weighmaster shall "take and subscribe the oath following." The section then gives the form of the oath. It begins in these words:—"I, A B, do swear (or affirm) that I will diligently and faithfully execute the office of public weighmaster (or taster of butter, *as the case may be*), of the city of —, or of the town corporate of —, or of —, in the county of —, being a place of export, or market town of —, in the county of — (*as the case may be*), *during the time I shall continue in said office.*" Then follow certain other matters, which the weighmaster is to swear that he will perform. In the oath, as actually taken and subscribed by the plaintiff in April 1860, instead of the words, "*during the time I shall continue in said office,*" the words were, "*during the time I shall hold said office.*" In other respects, the oath taken was in exact conformity with the terms of the oath prescribed by the 6th section.

At the close of the plaintiff's case, and afterwards at the close of the evidence at both sides, the learned Judge was called upon by the defendant's Counsel to nonsuit the plaintiff, or to direct a verdict for the defendant, on the following grounds, on which the defendant's Counsel contended that the appointment was invalid—that the plaintiff was not entitled to the fees, and that he was not in law possessed of the office. These several matters were argued before us—

First; it was contended, that, under the 2nd section of the Act 52 G. 3, c. 134, no appointment could be made by the Magistrates after the 1st of March 1813. The statute, in that section, in terms directs that, at some time before the 1st of March 1813, "in every seaport or place of export, from whence butter is commonly shipped for exportation from Ireland, such place being no city or town

“corporate, and in every market town wherein butter is bought or sold, or exposed to sale, for the purpose of trade, the Justices of the Peace for the county or counties in which such seaport or place of export and market town respectively lies, at some General Quarter Sessions of the Peace for such county or counties respectively, or some adjournment thereof, before the said 1st day of March 1813, under their hands and seals, where there shall not be a public weighmaster, or joint public weighmasters, appointed under any former Act or Acts, or where any vacancy shall happen before the said 1st day of March 1813, shall nominate and appoint some one or more discreet and proper person or persons, to be a public weighmaster, or joint public weighmasters, and taster or tasters of butter, in and for such place of export or market town; and, in case such nomination or appointment as herein directed *shall fail to be made* in such seaport or place of export in Ireland, *before the said 1st day of March 1813,*” then\* herein directed, such nomination and appointment shall be vested in the Lord Lieutenant or other Chief Governors of the Privy Council of Ireland for the time being.” I have omitted, in this recital of the 2nd section, any reference to cities or towns corporate, in which the appointment is given to the Chief Magistrate and Aldermen, or Chief Magistrate and Burgesses, except in the city of Dublin. The argument of the defendant’s Counsel was, that after the 1st of March 1813 the appointment was in the Lord Lieutenant, and not in the Magistrates at Quarter Sessions. It appears to us that this is not the meaning of the Legislature. The 2nd section is, in several parts of it, inaccurately worded; but, giving to it a reasonable construction, we must hold its true import to be that it vests the appointment in the Justices at Quarter Sessions—that it *directs* them to appoint before the 1st of March 1813, if the office be vacant; but that, to prevent a public inconvenience, and to establish, at an early period, officers of this kind in every town in Ireland contemplated in the section, it vests the appointment (in the event of their neglect) in the Lord Lieutenant, in reference to any vacancy existing on the 1st of March 1813. The 4th section

H. T. 1862.

Exchequer.

DEXTER

v.

CUST.

\* Sic.

H. T. 1862.  
Exchequer.

DEXTER  
 v.  
 CUST.

makes the weighmaster removable for misconduct, by the Mayor, Aldermen and Common Council in every city, by the Chief Magistrate and Burgesses in every town corporate, and in other places by the Magistrates at Quarter Sessions with the Assistant-Barrister, the 5th section giving in each case an appeal to the Judge of Assize. This provision shows the intention of the Legislature to be that a continuing authority and control should be exercised by the same persons in whom the first appointment is vested by the 2nd section. The 7 & 8 G. 4, c. 61, passed in 1827 (which abolishes the office of butter-taster in every town not being a seaport or place of export of butter), expressly refers, in the 4th section, to future appointments of weighmasters; and the 10 G. 4, c. 41, which relieved the public and the trade from the obligation of having casks of butter weighed and branded before being exposed for sale, not only contemplates the continuance of the office of weighmaster, but in the 2nd section expressly provides, "that nothing herein contained shall extend to abolish the office of any weighmaster or taster, or deputy weighmaster or taster of butter, or to prevent any person or persons offering any butter in casks, or any empty casks for the packing of butter for sale in Ireland, or about to export any such butter or casks, from requiring any such weighmaster or taster to weigh, taste and prove, inspect, mark and brand, any cask or casks of butter, or empty cask or casks for the packing of butter, in the manner in the said Acts prescribed" (referring to the former statutes), "and subject to all and every the provisions, rules and regulations, in and by the said Acts in that behalf contained and made." That the Legislature, therefore, in all those statutes passed *in pari materia* contemplated the continued existence of this office; and of course the continued appointments of the officers as vacancies should arise, is quite plain from the provisions to which I have referred. But, if the construction of the 2nd section of the 52 G. 3, c. 134, contended for by the defendant be right, it must follow that, wherever the local bodies obeyed the Act, and appointed to the office before the 1st of March 1813, there, after that date, no appointment could be made at all. No appointment could be made by the local bodies, because the 1st of March 1813 had passed; and none could be made

by the Lord Lieutenant, because there was no *failure* to make such appointment as the 2nd section directed, "before the said 1st day of March 1813," in which case only the nomination and appointment were in terms vested in the Lord Lieutenant by the 2nd section. We must construe the statute so as to avoid this absurd repugnancy between such a result and the other provisions of the Legislature, and hold that the power of appointment in the local bodies existed after the 1st of March 1813, as it existed before that date. I believe this very point was similarly raised, and similarly ruled, in the case of *Hudson v. Mahony* (an action brought by the butter weighmaster of Clonmel for a disturbance of his office), which was determined in this Court upon a bill of exceptions, and in which the judgment was affirmed by the Court of Error, but which, like many other cases at that time, has unfortunately not been reported.

H. T. 1862.  
Exchequer.  
 DEXTER  
 v.  
 CUST.

Secondly.—The next objection to the plaintiff's appointment was, that Mr. Mansergh's resignation was invalid. As to this, it is to be observed that the learned Judge was not called upon to leave any question to the jury. He was required, on this ground, to nonsuit the plaintiff, or to direct a verdict for the defendant on the issues, in reference to his appointment. There was no dispute that Mr. Mansergh had in fact executed a deed purporting to contain a surrender or resignation of the office. That instrument was executed before the plaintiff's appointment. It was laid before the Justices at Quarter Sessions, the body in which the law vested the power of appointment. They plainly accepted it, and acted on it as establishing a vacancy in the office, having among the documents in the possession of their officer, the Clerk of the Peace (who produced it at the trial), the instrument by which Mr. Mansergh had been appointed in 1827. I have heard no argument to show that they were not, or that any other party was, the proper authority to receive a resignation. The 11th section of the 52 G. 3, c. 134, provides that, if any weighmaster shall alien, sell or lease his office of weighmaster, then, and in every such case, his said office shall cease and determine. But the Act says nothing as to the effect of such a dealing on a new appointment; and although I am strongly disposed to think that an appointment corruptly procured, by a deception practised on the Magistrates, by



H. T. 1862.

*Exchequer.*

DEXTER

v.

CUST.

effecting, through a bribe, the retirement of a competent officer, and the procuring from the Magistrates an appointment, in ignorance of that surreptitious dealing, would be such a fraud upon the Magistrates as might invalidate the appointment; yet I am not prepared to say that a small sum paid, with the knowledge of the Magistrates, to an aged and incompetent officer, with a view to his retiring, without causing the trouble and delay of a proceeding compulsorily to remove him, would make the appointment void. In my opinion there was nothing in the facts of the present case to warrant the learned Judge in giving the direction required; and this ground of objection to his charge cannot be sustained.

Thirdly.—The next objection was taken upon the 4th section of the 52 G. 3, c. 134, which provides that the weighmaster or weighmasters “so to be nominated and appointed by virtue of and in “pursuance of the Act, before he or they, or any of them, shall “enter on the execution of said office, shall perfect a bond, with “sufficient security, to the Mayor of each city, Chief Magistrate “of each town corporate, and Justices of the Peace of each county, “at their County Sessions, *wherein* such public weighmaster or “public weighmasters, taster or tasters, shall be so appointed and “nominated, in such penalty as said Mayor, Chief Magistrate or “Justice, as the case may be, shall think reasonable, not exceeding “£500 sterling, or less than £50 sterling, for his and their true and “faithful performance and execution of his or their office; and that “the said weighmaster or weighmasters, and their deputy or deputies to be by them employed, together with the taster or tasters, “shall take and subscribe before the said Mayor, Chief Magistrate, “or Justices of the Peace, as the case may be, the oath (or, if a “Quaker, the affirmation) following.” And then follows the form of the oath. The ground of objection, as made at the trial, was, “because it appeared that, though said appointment was made at “said Sessions of October 1839, yet the bond and oath were not “perfected or taken before the Justices who made the appointment, “or at the same Sessions, or until the said Sessions of April 1860.” A good deal of argument was addressed to us by Counsel at both sides, on the inconvenience of either of the two constructions of this

section for which they contended. On the part of the defendant it was urged that we ought to hold that the bond should be perfected and the oath should be taken at the same Sessions at which the appointment was made, because otherwise an interval between two sittings of the Quarter Sessions would elapse, during which there would be a weighmaster incompetent to act, under the terms of the 6th section, which forbid him to do so until the bond should be perfected, and the oath should be taken; while, by the 12th section, the weighmaster is made liable to a penalty of £5 for every occasion, or at least every day, on which he ought to attend, and on which he or his deputy shall neglect or refuse to attend, for the performance of the necessary duties. On the other hand, it was urged that there was nothing in the statute to prevent the appointment of an absent person, whom the Magistrates might deem the fittest person to select; and that the statute could not have contemplated that if, by accident, by fatality, by illness or by unavoidable absence, the person appointed should not attend at the same Quarter Sessions, to perfect the bond and take the oath, his appointment should be wholly inoperative. The statute does not declare that the appointment shall be void if he fails to enter into the prescribed security, or to take the prescribed oath. Neither does it prescribe what the Magistrates are to do in the event of the Sessions closing, or being about to close, without the oath being taken, or the security being perfected; it only prohibits the person appointed from acting until those requisites shall have been complied with, and imposes a penalty for not acting; probably contemplating that these provisions would, in most cases, lead to the result that the requisites would be complied with immediately on the appointment being made. These opposing considerations of inconvenience at both sides it would be an idle task to discuss, with a view to determine on which side the preponderance of inconvenience lies. A better mode of interpreting the statute is to consider its words, and give to the context the meaning which, in the ordinary sense of its language, its words import; and it will be found that the whole controversy upon this matter is narrowed to the meaning of the term "wherein," where that term appears in the 6th section, "*wherein* such public weigh-

H. T. 1861.

*Eschequer.*

DEXTER

v.

CUST.

H. T. 1862.

Erchequer.

DEXTER

v.

CUST.

master," &c., "shall be *so* appointed and nominated." The defendant contends that this term applies to the words "at their County Sessions." The plaintiff contends that it applies to the words "of each city," "of each town corporate," and "of each county," in the antecedent part of the same clause of the section. And it appears to me that the latter is the true meaning of this clause of the 6th section. The previous part of the statute had provided for the appointment being made by distinct bodies, according as it was to be made in a city, in a town corporate, or in a town which was neither of these. The 6th section provides that the Mayor "of each city," the Chief Magistrate of "each town corporate," and the Justices of the Peace of "each county, at their County Sessions," "wherein such public weighmaster," &c., "shall be *so* appointed and nominated," shall be the persons before whom the bond shall be perfected, and the oath shall be taken. I think the words "shall be *so* appointed and nominated" must refer to each appointment made in conformity with the former provisions of the Act, as well in cities and towns corporate as elsewhere; and that being so, "wherein" must, in connection with these words, be construed as an adverb of place, indicating the place or jurisdiction within which the several functionaries described were authorised to act; and is not to be construed as applying to the *occasion* of the County Sessions—a construction which would exclude from this part of the clause the Mayors of cities and the Chief Magistrates of towns corporate. I think that the word "wherein" must be taken as prescribing that the different functionaries shall act in taking the bond, and administering the oath, within the limits of their respective jurisdictions; and that, unless this construction be adopted, there would be nothing in the terms of the Act to prevent the Mayor of the city, or the Chief Magistrate of the town corporate, from taking the security or administering the oath in any part of Ireland, or indeed in any part of Europe. The import which we thus give to the term "wherein," in the 6th section, binds each functionary to act within his own jurisdiction; and that being the construction of this term, there is nothing in the 6th section to prevent the bond being

perfected, and the oath being taken, at a sitting of the County Sessions, holden after that at which the appointment was made.

H. T. 1862.  
*Eschequer.*  
**DEXTER**  
*v.*  
**CUST.**

Fourthly.—The next objection was to the form of the oath taken by the defendant at the Quarter Sessions in April 1860. In the form of oath given by the 6th section, the words are, "I will diligently and faithfully exercise the office of public weigh-master," &c., "during the time I shall *continue* in said office." Then follow several specific engagements, binding to the performance of the duties of the office. The words of the oath, as taken by the plaintiff, were in exact accordance with the form given in the 6th section, save that in the oath, as so taken, the words were, "during the time I shall *hold* said office;" the word "hold" being used instead of the words "continue in." It was contended, on the part of the plaintiff, that by reason of this departure from the prescribed form of the oath, the plaintiff's appointment was avoided; or, at all events, he was, under the 6th section, not entitled to exercise the office or receive its emoluments.

I confess I have had some difficulty on this point, the only one on which, from the commencement of the argument, I have entertained the least doubt. I have an habitual repugnance to any departure, however small, from plain words of an Act of Parliament. But on consideration I am of opinion, that the variance in this case is too minute to warrant us in pronouncing a judgment adverse to the plaintiff, who in every other respect has complied with the requirements of the statute. It is perfectly plain that with a view, not to the purpose and object merely of the oath prescribed by the 6th section, but to the meaning of the form there given, the import of the terms used in the plaintiff's oath, and of those of the form given by the statute, is absolutely the same. It is impossible that the plaintiff should "continue in" the office without "holding it." As long as he should "continue in" it, so long he must "hold" it. If there be any difference between the two phrases, that of the oath, as taken, is more stringent than that of the oath prescribed. "Continue in" may possibly be considered as applicable only to a continuance in the office under the appointment in force when the oath was taken; "hold" may be considered as applicable to

H. T. 1862. *Exchequer.*  
 DEXTER  
 v.  
 CUST. a holding of the office at any time, whether under the then subsisting appointment, or under any appointment, existing or future, whensoever it might be made. No one of the decisions which have been cited to us by the defendant in the argument is directly applicable to the case now before us. In *Hart v. Lovelace* (a) a memorial of an annuity stated that the deed and bond referred to in it were executed by certain persons, and were all attested by and executed in presence of certain witnesses named, or one of them. It was held that this was not a compliance with the provision of the statute, 17 G. 3, c. 26 (*Eng.*), which required that the memorial should contain the names of "all the witnesses." Lord Kenyon, after adverting to the intention of the Legislature, "that every circumstance relating to the annuity should be disclosed," observed, that more information was likely to be collected if all the witnesses to the different documents be set forth, than if some only were mentioned; for some important parts of the transaction may perhaps be known only to the witnesses to one of the instruments. The Court therefore considered, that there were substantial noncompliances with the requirements of the Act of Parliament. In *Lovelace v. Curry* (b) there was a total omission of the statement of the *cause of action*, in the notice of action to a Justice of the Peace. In *Rex v. Jeffries* (c), the form of a conviction, which contained more than the form prescribed by an Act of Parliament, was held good notwithstanding the addition of the redundant matter. Lord Kenyon rested his judgment partly on the ground that the statute required the conviction to be "in the form or to the effect following;" and he said, "that if a particular form had been prescribed, as indispensably requisite, "it must have been strictly complied with." But what would or would not be a strict compliance with the Act, was not there in controversy. In *Hatton v. English* (d), and in *Pickard v. Brett* (e), there was a total omission of what the Act of Parliament, 17 & 18 Vic., c. 36, s. 1, required in the affidavit filed with

(a) 6 T. R. 471.

(b) 7 T. R. 631.

(c) 4 T. R. 767.

(d) 7 ELL. &amp; BL. 94.

(e) 29 Law Jour., Exch., 18.

the bill of sale. In *Beales v. Tennant* (a), the principle of the decision was the same as in the two cases last mentioned. In *Collins v. Hungerford* (b), the Court of Common Pleas held that the statute relating to notices of action to Magistrates required that the place of abode of the plaintiff's attorney should be indorsed on the back of the notice; and it appearing clearly upon the pleadings that this was not done in the case before them, they held that the statute was not complied with and that the notice was insufficient. In *Salmons v. Miller* (c), it was held that the words, "upon the true faith of a christian" were part of the oath prescribed by the Act of Parliament, and that an oath omitting these words was not in conformity with what the statute required. In each of these cases (which were cited for the defendant) there was an omission of matter positively required by the Act of Parliament. None of them, therefore, applies directly to the question which arises in the oath before us. Three cases were cited for the plaintiff in the argument. The case of *The Lancaster and Carlisle Railway Co. v. Heaton* (d) seems, at first view, to furnish a close analogy to the present case. There, the Act of Parliament prescribed that no person appointed as there mentioned should be capable of acting, &c., "until he shall have taken *and subscribed* an oath *in the words following*." Then follows a form of oath, containing at the close the words "so help me God." The Court held that an oath subscribed, not containing those words, was in compliance with the statute, on the ground, however, that those words were no part of the oath. On the one hand, that decision shows that the Court will consider the terms of the form of oath prescribed, with a view to what is, or what is not, a substantial compliance with the statute, though all the words prescribed are not used; but on the other hand, the reason of the decision shows that, as the words in question were held to form no part of the oath, the terms of the oath itself were not, in that case, a subject of controversy; and, in that view, it cannot be treated as an authority determining the case before us.

H. T. 1862.

*Exchequer.*

DEXTER

v.

CUST.

(a) 29 Law Jour., Q. B., 188.

(b) Ir. Jur., N. S., 519.

(c) 7 Exch. 475; S. C., 8 Exch. 778.

(d) 8 Ell. &amp; Bl. 953.

H. T. 1862.  
*Exchequer.*  
**DEXTER**  
 v.  
**CUST.**

In *Mountcashell v. O'Neill* (a), a question arose on the 23 & 24 G. 3, c. 39 (*Ir.*), by which certain persons were empowered to acquire property in trees planted by them, by registering the trees. The second section required that the "person so planting" should, within twelve months, lodge with the Clerk of the Peace of the county an affidavit "reciting the number and kinds of the trees planted, and the names of the lands, in form following." The form was, "I, A B, do swear, that *I* have planted or caused to be planted, in the lands of —, held *by me* from Mr. —," and "that I have given notice to the person under whom I immediately derive, or his agent, of my intention to register." Notwithstanding the words "*I*" and "*my*" in this form, indicating that the affidavit should be sworn by the person who should be actually the tenant of the lands, the House of Lords (affirming the decision in that respect of the Court of Exchequer Chamber in this country\*), held, that the affidavit might be made by the agent and manager of the tenant, and that the form of the affidavit might be modified so as to suit the position and character, as agent, of the person who should swear it. This decision was founded mainly on the consideration, that the intention of the Legislature to allow all the persons specified in the statute to register could not be executed if the form were strictly adhered to. Such would have been the result in the case of infants; of tenants for life, and of persons having other interests specified in the Act, but not holding under lease; and also in the case of extensive planting, where the trees planted could not be all known to the tenant, and could only be deposed to by a plurality of persons. It was therefore considered that, as to the form, the statute was directory; the form being only an example to be followed in the case to which it applied, but to be modified where it could not be strictly followed. In *Reg. v. Milner* (b) a bastardy order, made under the 7 & 8 Vic., c. 101, was framed in conformity with the form given by the 8 Vic., c. 10, in every particular save

(a) 5 H. of L. Cas. 937; S. C., 5 Ir. Com. Law Rep. 586.

\* 4 Ir. Com. Law Rep. 345.

(b) 3 D. & L. 128.

one; namely, that according to that form the Justice of the Peace who granted the summons should have been described as "usually acting *for*" the division of the county: in the order he was described as "usually acting *in*" the division. It was contended that the variance was fatal to the order; on the ground that a Justice of the Peace acting "in" a place, may yet be acting out of his jurisdiction; that it was a mere designation of locality, and did not show jurisdiction in the Magistrate granting the summons. Mr. Justice Coleridge held the order good. He said, in giving judgment: "Without meaning to say that 'in' and 'for' are "synonymous terms, I find, on reference to the forms given in "the Act, *that they seem to be used there as such*; and I *therefore* think that this objection cannot be sustained." In the first of these three cases, the Court held that words contained in the prescribed form of the oath might nevertheless be omitted, because they were of opinion that they formed no part of the oath. In the second, the Court held that the form might be modified, because otherwise the intention of the Legislature, disclosed in other parts of the statute, could not be effectuated. And in the third, the Court held that a word not in the form prescribed by the statute, might be used in the form used by the Magistrate; because having regard to the frame of the forms, the two words "in" and "for" were *to be treated* as synonymous. Although these decisions cannot be considered as authorities directly applicable to the case before us, they establish that a form prescribed by an Act of Parliament *may* be departed from on special grounds. In the last case which I have cited, the circumstance that the words were to be treated as synonymous was expressly the ground of the decision. In the case before us, the words used in the oath taken are, as I have already stated, synonymous with those contained in the form given by statute; and it appears to me that, notwithstanding the verbal difference, the requirements of the statute have been complied with. I cannot close what I have to say on this part of the case without condemning, in the strongest manner, the carelessness of the person, whoever he was, who with the Act of Parliament before him, has involved parties in the risk, trouble and

H. T. 1862.

Eschequer.

DEXTER

v.

CUST.



H. T. 1862. expense of this controversy, simply by not writing down that which  
*Exchequer.* it was his business to copy in the language of the Legislature, and  
 DEXTER not to translate into synonymous words of his own.  
 v.  
 CUSW.

Fifthly.—The next head of objections, comprises those which were made to the charge of the learned Judge, in reference to the question of disturbance. Those objections apply to the directions given to the jury in reference to the second and tenth issues, and also in reference to the sixth and eighth.\* These issues in effect involve simply the questions, first, whether the plaintiff was disturbed in his office; and, secondly, whether he was so disturbed by the means referred to in the issues, namely, first, by opening a public weigh-house, and taking fees for weighing butter? secondly, by employing persons to entice away from the plaintiff's weigh-house those who would otherwise have resorted to it? thirdly, by enticing away such customers by means of placards and advertisements; and, fourthly, by exercising the office of butter weighmaster? and, fifthly, by taking fees belonging to that office? In support of the affirmative of each of these issues, evidence was given by the plaintiff; and

\* Second.—Whether the defendant exercised the office of public weighmaster in and for the market town of Tipperary; or whether he did, within the said market town, receive or take divers or any fees, or emoluments or perquisites or profits, belonging to the office of public weighmaster of butter, in and for the said market town; or to the plaintiff, as such public weighmaster as in said first count alleged?

Fourth.—Whether the defendant opened, or caused or procured to be continued open, for any time, or at all, a public weigh-house, for the weighing of butter in the market town of Tipperary, as in the second count alleged; or whether the defendant did, in the said weigh-house, take and receive any fees, as in the said second count alleged?

Sixth.—Whether the defendant employed any person whomsoever to do all or any of the acts complained of; and whether the defendant did, by the public exhibition of placards and advertisements, or of either of them, entice away or induce not to resort to the weigh-house of the plaintiff, any farmers or others of the public, as in the fourth count alleged?

Seventh.—Whether the defendant disturbed the plaintiff in the exercise of his alleged office, by any of the means in the first, second, third or fourth counts respectively alleged?

Eighth.—Whether the defendant hindered and disturbed the plaintiff in and from exercising the alleged office of public weighmaster of butter within the said market town of Tipperary, as in the fifth count alleged; and whether he prevented the plaintiff from receiving the fees and emoluments, as in the said fifth count stated?

evidence perfectly conclusive, as it seems to me; was supplied by what appeared, upon the defendant's cross-examination... Upon the plaintiff's evidence (if believed) the following matters appeared: The plaintiff had (as I before stated) acted, from 1852 to October 1859, as butter weighmaster in the town of Tipperary, without any appointment. Prior to 1852 a Mr. Richard Sadlier, and afterwards the plaintiff's brother, had acted in the same manner, without any appointment. Between the years 1852 and 1859, the butter trade of the town had greatly increased; and the plaintiff's profits derived from the fees for weighing had advanced from £20 to £500 a-year. The defendant was the agent for the trustees of the estates of Mr. Smith Barry, who was the owner of the soil on which the town, or a part of it, was erected, and also the owner of the market-tolls of the town. The defendant was aware of the extent of the plaintiff's emoluments; the plaintiff himself having informed him that they amounted to £500 a-year; and on one occasion, in 1858, the defendant introduced the plaintiff to Mr. Widdington, one of the trustees, as the "richest man in Tipperary." Prior to October 1859, some controversies had arisen between the plaintiff and some of the butter merchants or butter buyers of the town; and they opened a weigh-house in a street situate near the plaintiff's weigh-house, and running at right angles with it, where they weighed butter. The result of this was a diminution of the plaintiff's emoluments. In October 1859, the plaintiff obtained his appointment; and he brought actions against some of the "Associated Butter Merchants," by whom the new weigh-house had been opened. The particulars of these actions did not appear in the evidence upon the trial in the present case; but it appeared that one of them was tried at the Assizes of Waterford in July 1860. Some time in the Spring of 1860, the defendant proposed to the plaintiff that the plaintiff should retire from the transacting of the business of weighmaster, and execute a deputation to a person named Riordan, in consideration of the defendant giving plaintiff a sum of money, and a percentage on the profits of the business. Riordan was the lessee, under Mr. Smith Barry, of the market-tolls (including a penny for each firkin of butter sold on market-days), and was also weighmaster

H. T. 1862.  
*Exchequer.*  
 DEXTER  
 v.  
 CUST.

H. T. 1862.

*Eschequer.*

DEXTER

v.

CUST.

under the statute 4 Anne, c. 133, a distinct office from that of weigh-master of butter, under the 52 G. 3, c. 134, with different fees. To this proposition the plaintiff declined to accede. Among the communications on this subject was a letter of the defendant, addressed to the plaintiff, dated the 29th of May 1860, which contained the following passage :—" You have also probably weighed well the "consequences to your interests, in the event of the Market and "Fairs Bill passing; *or in the event of my being able to drive a successful opposition.* The former requires no comment; and in the "latter you can picture to yourself the consequences where *two "opposition houses* stand together—the one making charges, the "other none; especially where one has a heavy rent to pay, which "the other has not." The defendant proceeded to erect a weigh-house in the same street with that of the plaintiff, and about fifteen yards distant from it. After it was built, and some time before it was opened, a meeting took place at the defendant's office in the town, attended by several butter merchants, and by the defendant, at which the future management of the defendant's weigh-house was the subject of discussion. Shortly after the meeting, the defendant proposed to several of the merchants, who were then weighing their butter at the plaintiff's weigh-house, as an inducement to them to send their butter to be weighed at the weigh-house to be opened by the defendant, that he would undertake the carriage of their butter from their stores to the railway, by which it was estimated that they would save a farthing for every firkin. One of these, a Mr. M'Donnell, bought butter to the extent of 10,000 firkins, in the year. Two others, the Messrs. Hewston (the uncle and cousin of the plaintiff), composed a firm which carried on the largest trade in butter in Tipperary, purchasing in the year about 35,000 firkins, amounting in value to about £100,000. To this firm the saving in carriage would have been about £50 a-year. In one of the conversations, the defendant acknowledges that "he must do something more to bring the butter trade to his house." And on one of those occasions, on the 29th of May, the defendant went to the plaintiff's weigh-house, where Mr. Hewston was, and called him out, for the purpose of holding the conversation in which he made the above

proposal. Those butter merchants (Messrs. M'Donnell and Hewson), were three of a small number (six were named in the evidence) who continued, to a very, late period, even after the defendant's weigh-house was opened, to adhere to the plaintiff, and to weigh at his weigh-house. A Mr. Fowler was another. Shortly before the 12th of July 1860, a meeting took place between some of the Associated Butter Merchants (including a Mr. Hayes, the defendant in one of the actions brought by the plaintiff against some of those merchants), at which the defendant, on behalf either of himself or of the trustees, agreed, "if they would go to his weigh-house, to indemnify them against the costs of the litigation, to the extent of £500. The case against Hayes was tried at the Waterford Assizes, in July 1860. On Saturday the 14th of July, the weigh-house of the Associated Butter Merchants was closed. On Monday the 16th of July, during the Waterford Assizes, the defendant's weigh-house was opened, in pursuance of an announcement to the public by placards, in which it was called the "Butter Market-house," and in which Riordan was described as general weigh-master. The staff of attendants who had belonged to the weigh-house of the Associated Butter Merchants acted at the defendant's weigh-house. For a considerable time, butter was weighed there free of charge. Evidence was given, by some of the plaintiff's witnesses, that some of the men in the defendant's employment, including Riordan (on one occasion, in the defendant's presence), stood in the street, and invited persons with carts and horses, bringing butter to the town, and passing near both weigh-houses, to bring their butter to the defendant's weigh-house. Proof was given that this was openly done by persons acting in his weigh-house. In the month of October, the defendant caused an announcement to be made by placards, that in future twopence per firkin would be charged; and thenceforward butter was weighed there, and that charge was made. The result of all these proceedings was, that the plaintiff's weigh-house became totally deserted. He had still his beams and scales, and some of his staff, including his deputy; but no butter was brought to his weigh-house. In the voluminous evidence, of which I have given this outline, there was abundant

H. T. 1862.

Exchequer.

DEXTER

v.

CUST.

H. T. 1862.  
*Exchequer.*  
 DEXTER  
 v.  
 CUST.

proof to sustain the affirmative of all the four issues which I have stated, and in reference to which the objections are made to the charge of the learned Judge. But that evidence actually pales before the proof supplied by the defendant himself upon his cross-examination. In a few short sentences he stated almost everything which in substance was required to sustain those issues. He stated not only the acts which were done by him, but the purpose for which they were done, and the injurious results to the plaintiff; thus supplying not only the facts which it was necessary for the plaintiff to prove, but the inference which was to be drawn by the jury. After stating his knowledge of the manner in which "people" "used to sell their butter, and get it weighed at his (the plaintiff's) "store," and stating what had occurred at the October Sessions of 1869, and other matters, to which I need not refer in detail; he admitted, on his cross-examination, that he had offered the plaintiff £200 and £10 per cent. on the gross proceeds, to induce the plaintiff to comply with his terms. He admitted that his present weighmaster was Merryman, who had been the weighmaster of the Associated Butter Merchants until they closed; and that Merryman and two of their porters had come to him on the 16th of July. He admitted that he had got the placards printed, and had paid for them. He then made the following further statements on his cross-examination:—"I believe the opening of my house *entirely* "*took away* the business from the plaintiff, after some time; but "not at first. The weighing of the butter which I referred to "in my letter of the 29th of May 1860, as '*driving an opposition,*' "was carried on in my weigh-house. When I made the offer of "£200 and £10 per cent. I knew he was obliged to leave the "country, from not paying costs; but I did it from kindness. I "made the offer to Hewston and McDonnell of carting their butter "to the railway station; as stated by them. I told Mr. Fowler that "if the parties did not agree, the trade of the town would be injured, "and that I should bring merchants from elsewhere to buy butter, "and should offer them some inducements; and I told him that I "would give him sixpence a-firkin if he would come to me with "other merchants. I conveyed by that, that he should leave plain-

"tiff. I charged the twopence per firkin. The men are there for  
 "the purpose of weighing; and Riordan and the staff who are  
 "there for that purpose, namely, E. Hayes (clerk of the Associated  
 "Butter Merchants), a weigher and two porters, are paid out of the  
 "twopence per firkin." There was thus, in the testimony of the  
 plaintiff, and the admissions of the defendant, what appears to me  
 conclusive proof of disturbance of the plaintiff in his office. And  
 there was proof in those admissions that the defendant, in causing  
 that disturbance, used every one of the means referred to in the  
 second, fourth, sixth and eighth issues, except the enticing, through  
 those in his employment, persons to come to his weigh-house, who  
 would have otherwise gone to the plaintiff; but the evidence on that  
 subject, given on the part of the plaintiff, the defendant did not con-  
 tradict. There was clear proof that he opened a public weigh-house  
 for the weighing of butter; that he took, for weighing butter there,  
 the same fees which the statute prescribed to be taken by the butter  
 weighmaster for weighing butter; that he used placards and adver-  
 tisements as the means of inducing the public to leave the plaintiff's  
 weigh-house and resort to his own; that, in opening a public weigh-  
 house, and weighing butter there for the statutable fees, he exercised  
 the functions of the office of weighmaster, and received its fees,  
 "driving," to use his own words, "an opposition" to plaintiff; and  
 that, by all these means, he disturbed the plaintiff in the exercise  
 of his office, and prevented him from receiving the fees of that  
 office, by causing those who would have paid them to leave the  
 plaintiff's weigh-house, and resort to that of the defendant. And  
 it was admitted that all was done with the deliberate design to  
 withdraw the custom of the public from the plaintiff, and transfer  
 it to the defendant, and that such was in fact the result. Upon  
 this evidence, the instructions of the learned Judge to the jury  
 (which ought to be considered in their entire bearing upon the case),  
 were, as to the second, fourth, sixth and eighth issues, as follows:—  
 Upon the second and fourth (those relating to the opening of the  
 weigh-house, the exercising the office of public weighmaster, and  
 the taking of fees), he told them, "that they were at liberty to  
 "consider the conduct of the defendant, and of those acting under

H. T. 1862.

*Exchequer.*

DEXTER

v.

GUST.

H. T. 1862.

Eschequer.

DEXTER

v.

CUST.

"him, in reference to the original establishment of defendant's butter market, and to the manner in which, and the purposes for which, it was subsequently used; and that, if it was kept open for all such of the public as sold butter to bring it there for the purpose of being weighed for a pecuniary charge, that was evidence in support of the affirmative of those issues, even though the defendant and his servants, in the establishment and conduct of that concern, may have *ostensibly* established or treated it as a butter market." And with respect to the second issue, the learned Judge also told the jury "that it was a material consideration whether defendant did acts that would be properly performed by a weighmaster, and received fees for so doing." With respect to the first and eighth issues, and so much of the seventh issue as related to the first, second and fourth paragraphs (all which matters are involved in the second, fourth and sixth issues) the learned Judge told the jury "that plaintiff's office was one to which the Act of Parliament annexed emoluments, in the shape of fees, for performance of duties, and that the disturbance of that office might be by enticing away from plaintiff persons who would otherwise have resorted to him to have their butter weighed; and by taking fees which plaintiff would have otherwise received for the performance of his duties."

To these directions the Counsel for the defendant objected; and as to second and fourth issues, "required him to tell the jury, that unless they believed the defendant did, or assumed to do, some act which plaintiff under the 52 G. 3, c. 134, was exclusively privileged to do, such as branding the casks or assuming the authority of butter weighmaster, there was no usurpation of the office within the meaning of the first paragraph; and that unless the fees were received for something which the plaintiff was exclusively authorised to do, it would not be a receipt of fees within the meaning of the paragraph, even though received for weighing." With respect to the sixth and eighth issues, and to so much of the seventh as related to the first, second and fourth paragraphs, the defendant's Counsel required the learned Judge to tell the jury, "that the acts relied on as enticements would not be ground for an action, unless

"the means used were an assumption of some privilege of the plaintiff; or were deceitful, violent or wrongful, independent of the mere fact of withdrawing plaintiff's customs or profits." H. T. 1862.  
Eschequer.  
DEXTER  
v.  
CUST.

The learned Judge refused to alter his charge, or to instruct the jury in the form in which he was required to direct them. In my opinion his directions were perfectly right; and comprised all that the defendant was entitled to require. The plaintiff's office is a franchise, conferred by Act of Parliament. It is an office held during good behaviour; with an obligation to perform certain public duties; and a right to fees for the performance of those duties. The case of *Hudson v. Mahony* established that the holder of the office is entitled to maintain an action for a disturbance in its enjoyment. The word "usurpation" is used in one of the objections. There is no such word in the plaint. The plaintiff does complain of the defendant exercising the office and receiving fees and emoluments belonging to it. The opening of a butter weigh-house for the public; the weighing of butter there for the public, and so weighing for fees; and for fees exactly corresponding in amount with those prescribed for the office by the Act of Parliament, and the doing of all this, avowedly to carry on an opposition to the plaintiff in the very business of his office, were plainly evidence of an exercising of the very functions, for the discharge of which the office was created by one statute and continued by another; and therefore were evidence of the *exercise* of the office and the receiving of the fees of it. The doing of those acts, and the other acts before specified, with the result of withdrawing from the plaintiff customers, or persons who would otherwise have weighed their butter at his weigh-house, and have been chargeable with the fees, was a disturbance of the plaintiff in the enjoyment of his office. It is not necessary (as one of the objections appears to indicate) that there should be an *assumption* of the office *as such*. The cases in which questions have arisen in modern times as to disturbance in the enjoyment of a franchise, have been chiefly in reference to markets and ferries. A disturbance of the owner of a market in the enjoyment of his franchise may be effected, even by doing what is tantamount to setting up



H. T. 1862.

Eschequer.

DEXTER

v.

CUST.

a new market, without an "assumption" or "usurpation" of the franchise. In *Mosely v. Chadwick*, reported in 7 *Barn. & Cres.* p. 47, *note*, Lord Mansfield, in delivering the judgment of the Court, stated the nature of the action: "This is an action on the case, brought by Sir John Parker Mosely against the defendant, for depriving and defrauding the plaintiff of the profits and emoluments of his market, by erecting another market in a certain place near the plaintiff's market, for selling and exposing to sale fleshmeat, for hire and reward, without the license and against the will of the plaintiff. There is a special verdict; and the result of that special verdict is, that the plaintiff was seised of a franchise for holding a market, and that the defendants erected about 140 stalls very near his market; but that they took no toll; they had no pretence of a pie-poudre court; they had no clerk of the market; and they only took money in the nature of rent for the stalls which they had erected. The question was, whether this action would lie, or whether it was a damage? And the special verdict finds, that there was a diminution of the profits of the plaintiff arising from the market, to the amount of £90; but the amount of the sum is not material; and the great question which arose out of the special verdict was; whether an action would lie by the owner of such a market against another, who only made a rent of his own land applied to the use of selling, which was a lawful act, and took *nothing that amounted to an assumption of a franchise upon the Crown?* Upon consideration we are of opinion, that we are bound, by the authorities cited in this case, to say, that this was a damage that carried with it that sort of injury that is sufficient to support an action." Lord Mansfield then proceeded to review the authorities; and the Court determined that the plaintiff was entitled to recover. In the cases in which actions have been brought for selling near a market, and so depriving the owner of the market of his tolls, the plaintiff does not necessarily, or always, complain of the setting up of a new market, though the complaint is sometimes made in that form. Neither does the declaration, in these cases, necessarily charge deceit or

fraud (though the evading of the tolls by such means may be, in its very nature, and I think is, a fraud upon the plaintiff as owner of the franchise), the allegation of fraud being sometimes included, and sometimes omitted, in the declaration: *Mosely v. Walker* (a); *Prince v. Lewis* (b); *The Mayor of Machlesfield v. Pedley* (c); 2 *Chitty on Pleading*, p. 818. And there can be no doubt that selling, to the injury of the owner of the market, near a market where there was sufficient accommodation, would create a right of action for the disturbance of the franchise, without any express assumption of the franchise on the part of the defendant, and without any other deceit or fraud than that involved in depriving the owner of the market of his tolls. Yet the selling out of the market is, in itself, a perfectly lawful act, and can only be the foundation of an action by reason of the injury to the owner of the franchise. So in the case of a ferry. There can be no doubt, that it is perfectly lawful to pass from one side of a navigable river to another, or from one bank of any river to another, where it can be done without a trespass to the land. And if this is done for the conveying of persons to a place not within the line of the ferry, or not usually reached by means of it, it cannot, as a general rule, be made the ground of action for a disturbance of the ferry. But if passengers are conveyed to a spot on the shore near the ferry, to the injury of the owner of the ferry, it is equally clear that an action lies; and this without any intention to deceive or defraud, and without any assumption of a right to maintain a ferry as such. In *Hussy v. Field* (d), Lord Abinger lays down the following propositions of law affecting this subject.—“If anyone should “construct a new landing place at a short distance from the terminus of the ferry, and make a practice of carrying passengers “from the other terminus, and there landing them at that place, “from which they pass to the highway upon which the ferry is “established, before it reaches any town or vill, and by which “the passengers go immediately to the first, and all the vills and

H. T. 1862.

*Eschequer.*

DEXTER

v.

CUST.

(a) 7 B. &amp; Cres. 40.

(b) 5 B. &amp; Cres. 363.

(c) 4 B. &amp; Ad. 397.

(d) 2 Cr. M. &amp; B. 432; S. C., 5 Tyrw. 855.

H. T. 1862.  
Exchequer.  
 DEXTER  
 v.  
 CUST.

"towns to which that highway leads; there could not be any doubt that such an act would be an infringement of the right of ferry, *whether the person so acting intended to defraud the grantee of the ferry or not*. If such new ferry be nearer, the fare less, it obvious that all the custom must inevitably be drawn from the old ferry; and thus the grantee would be deprived of all benefit of the franchise, while he continued liable to all the burthen imposed upon him. It does not follow from this doctrine, that if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river as a public highway, from or to all the towns or places on its banks, and obliges them, upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other. The case of *Trepps v. Frank* (a) decided otherwise; and it is not intended to question that decision." The general rule, stated by Lord Abinger in reference to the disturbance of a ferry, appears to be recognised in *Blacketer v. Gillett* (b); in *The North and South Shields Company v. Barker* (c); and see the judgment of Baron Parke, pp. 148-9. And also in the decision of the Court in *Pim v. Curel* (d)—(see the third head of objections in that case). So in the case before us. Since the statute which repealed the enactments requiring casks of butter to be weighed and branded before they should be sold, the act of weighing butter, in any place or in any scales, is, in itself, and irrespective of its effects on the office of weighmaster of butter (like the travelling or the conveying of a passenger from one bank to another of a river, over another part of which there is a ferry), perfectly lawful. But if it be done in such manner that the weighmaster, who is bound by the obligation imposed by the statute, and by his oath, to perform the service of weighing for statutable fees, and to devote his time for that purpose, and to supply the expense of weighing arrangements, shall be deprived of emoluments given by the statute, while another person who weighs in another place near him recovers a pecuniary

(a) 4 T. R. 666.

(c) 2 Exch. Rep. 136.

(b) 9 Com. B. 26.

(d) 6 M. & W. 234.

fee for performing the very same service; and by so performing the service, withdraws from the office the statutable fees; the office, which the Legislature, for the benefit of the public, directed to continue a subsisting office, must cease to exist unless, under such circumstances, this action can be maintained. The main argument of the defendant's Counsel, as I understood it, resolved itself into this: that it has ceased to be obligatory to have butter weighed by the butter weighmaster before it is sold; that it is, therefore, now a lawful act for any person to weigh butter; and that being so, that the doing of that act, or rather of a repetition of such acts, cannot be the subject of an action, by reason of the profits of the plaintiff's office being thereby withdrawn. For this last proposition no authority was cited, applicable to an office with public duties, with an obligation to perform them, with an obligation to supply the necessary accommodation; and with prescribed fees. The very nature of the office shows, that though the mere act of weighing butter is not the exclusive privilege of any person, the weighing of butter for the general accommodation of the public, and the receiving of the prescribed fee for that service, is the exclusive privilege of the weighmaster appointed under the statute 52 G. 3, c. 134. The principle of the authorities to which I have referred is entirely opposed to the proposition for which the defendant's Counsel so contended; I may add, that much of what is contained in those objections was presented to the jury in different words by the learned Judge; whose directions to the jury were, in my opinion, as to the subject of those objections, right in point of law, and fully warranted by the evidence.

H. T. 1862.  
*Eschequer.*  
 DEXTER  
 v.  
 CUST.

Sixthly.—The last objection applies to the instructions in reference to damages, given by the learned Judge to the jury. He states, in his report, that he commented on the evidence; and in the other parts of his charge, as reported, he left the entire conduct of the defendant, both before and after the opening of the weigh-house, to the consideration of the jury. As to damages, he asked the jury to ascertain (which they did) the amount of fees of which plaintiff was deprived by the defendant's proceedings, and also how much of these was actually received by the defendant. The

H. T. 1862.  
Exchequer.  
 DEXTER  
 v.  
 CUST.

difference between these two modes of calculation arises from the difference between the period in which the defendant weighed gratuitously, and the period during which he received a fee equivalent to the statutable fee. In result this difference is immaterial. The jury, after making a considerable abatement from the defendant's actual receipts, for butter which might not have been weighed at the plaintiff's weigh-house, even if the weigh-house had not been open, and also for expenses, found that the entire sum withdrawn from the plaintiff was £149. 6s. 0d., including £24. 6s. 0d. received by the defendant *after* he began to make the charge for weighing. The learned Judge further told the jury that, in finding the amount of damages, they were not necessarily limited to such sum as they should so ascertain; "but that they were at liberty also to give, in addition to that sum, such further sum as they might, under all the circumstances, be of opinion would be equivalent to the further damage which the plaintiff sustained beyond the amount of that sum, by reason of the defendant's said acts, complained of as aforesaid, in the first, second, third and fourth paragraphs." This instruction to the jury was objected to by the defendant's Counsel, who called on the learned Judge to tell the jury that the damages should be limited "to what the plaintiff lost by profits diverted from him, which would otherwise have gone to him; or else to the amount of such profits, deducting therefrom an allowance for expenses." The jury estimated the damages, in addition to the £149. 6s. 0d., at £350; and the verdict was entered according to those findings. The question raised by this objection is closed by authority. Several other *dicta* and authorities were cited in the argument; but, in the recent case of *Emblen v. Myers* (a), it was determined that what are sometimes called exemplary damages, that is, damages exceeding pecuniary or proprietary loss, and founded on the conduct and motive of the defendant in doing the injury, may be given by a jury in an action on the case, as well as in an action of trespass. In a still more recent case, *Bell v. The Midland Railway Company* (b), the same prin-

(a) 6 H. & N. 54.

(b) 30 Law Jour., C. P., 273; S. C., 7 Jur., N. S., 1200.

ciple was re-affirmed and applied. If circumstances and conduct can ever furnish grounds for warranting a jury in giving damages beyond mere pecuniary loss, the facts of this case supply them. The defendant acted with deliberate design, formed early, and perseveringly prosecuted. That design was, to erect a weigh-house of his own, and to acquire profits for that weigh-house, by withdrawing custom and profits from the plaintiff. The purpose was, to create a property in his own rival concern, by effecting the ruin of the plaintiff's business. The project was perfectly successful. The plaintiff was ultimately left without business or fees. The means employed were such as to merit the strongest condemnation. It is quite plain that the gratuitous weighing was a contrivance which, when it had answered the purpose of withdrawing custom from the plaintiff, and attaching it to himself, the defendant never intended to continue. And it is equally plain that he offered benefits which, in plain, blunt English, were nothing less than bribes, to induce the plaintiff's friends and relations to desert him. The defendant alleged that he acted not for his own benefit, but for that of his employers, and for the advantage of the town of Tipperary. So far as related to the plaintiff's rights in this action, it is perfectly immaterial for whose benefit the defendant planned and accomplished the ruin of the plaintiff's business. Whether he acted for his own peculiar profit, or for the benefit of his employers, or for that of the town, the law does not sanction his pursuit of any of those objects to the injury of another; and if the plaintiff be entitled to this office, the defendant must make compensation, in damages, for the wrong which he has done, and for the circumstances of aggravation by which it was accompanied. Independently of those considerations, there is another ground on which I think the jury were at liberty to give damages beyond the amount of pecuniary loss proved. The value of the business of the plaintiff, and of the weigh-house in which he carried it on, in the discharge of his official duties, depended largely upon the habit and practice of the sellers of butter to resort to his weigh-house. Where a habit and practice of any portion of the public so to resort, with a view to the disposal of their goods, has been

H. T. 1862.

*Eschequer.*

DEXTER

v.

CUST.

H. T. 1862.

*Eschequer.*

DIXTER

v.

CUST.

once interrupted for a substantial period of time, and customers are thus detached from one place, and induced to resort to another, there is a necessary loss of value of the concern which is relinquished. The result resembles what occurs in the loss of what is called "the good will of a house" established in any department of trade. There is always a difficulty, a delay, a trouble and an expense, in re-establishing a business which has been once suspended for any considerable period of time. In the present instance the plaintiff, whenever he shall resume the business which for the present has ceased substantially to exist, will probably be obliged to re-organise a staff of attendants, and to apply time and trouble and care in training them to their duties. Customers who formerly resorted to him will probably be in some, if not in many instances, induced, by the severance of the connection, to go to other markets, or to weigh their own goods, instead of weighing them at his scales for the official fees. Wholly irrespective therefore of the wilfulness or offensiveness of the defendant's conduct, and of any injury merely prospective, the result of the defendant's proceedings, in disturbing the plaintiff in the enjoyment of his office, may be fairly answered as involving a present diminution of the value of the business attached to the office, over and above the pecuniary loss in the mere withdrawal of the fees. It is enough, however, to say that the instructions to the jury in reference to damages were in accordance with the law as established by decisions, with the principle of which I fully concur.

Seventhly.—A point was made in reference to Tipperary being a "seaport or place of export from which butter is commonly shipped for exportation," or "a place of export," within the meaning of the statute 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61. The question raised on this subject, both on the pleadings and on the evidence, is in effect precisely that which has been already ruled by the decision of this Court, in *Dexter v. Hayes* (a), which was afterwards affirmed by the Court of Error. I did not take a part in the discussion on the judgment in that case, which, I believe, was determined by the other Judges of the Court sitting *in Banco*, while I was engaged at

(a) 11 Ir. Com. Law Rep. 104.

Nisi Prius. My opinion on the subject is now immaterial, since the question has been closed by the decision of the Appellate Tribunal. But, having read the very able judgment of my Brother FITZGERALD, delivered in this Court, I wish to say that I entirely concur in that judgment.

H. T. 1862.  
*Exchequer.*  
 DEXTER  
 v.  
 CUST.

FITZGERALD, B.

With reference to the question of disturbance, I think there was ample evidence that the defendant did disturb the plaintiff in his office of weighmaster. The Judge's charge is to be considered as applied to the evidence; and applied to that, I cannot see that he directed the jury to consider any question which they were not warranted in doing.

With respect to the question of damages, I have had some hesitation; but upon that too the charge is to be considered with reference to the objection made by Counsel; and that objection presses the matter too far. I cannot assume that the charge was not properly guarded.

I quite concur with my LORD CHIEF BARON, in the construction he has given to the Act of Parliament, with reference to the taking of the oath at Quarter Sessions; but I am not able to satisfy my own mind that the objection with reference to the omission of certain words in the oath is not well founded. It appears to me that the words are part of the oath which the Act requires to be taken, and the provision in the statute being that the oath shall be taken *in hæc verba*, that it is not in the power of the Court to treat any other words as equivalent.

HUGHES, B.

I concur in the judgment of my LORD CHIEF BARON, including the portion of it which refers to the form of oath to be taken by the plaintiff.

DEASY, B.

I regret to say that I am unable to concur in that part of my LORD CHIEF BARON's judgment which relates to the oath. The



H. T. 1862.  
*Exchequer.*  
 DEXTER  
 v.  
 CUST.

statute is imperative that the weighmaster shall take the oath which it sets out. The oath taken in the present case omits two words from that form, and substitutes other words. Where a statute imperatively requires a party, before entering on an office, to take a particular oath which it specifies, any person claiming that office is not at liberty to substitute words of his own. On the contrary, I find very high authority, that of Baron Alderson, in the case of *Miller v. Salomons*, for saying that in such a case the requisitions of the statute must be literally complied with; and Chief Baron Pollock also, in his judgment in that case, distinctly repudiates the doctrine that Courts were to be at liberty to depart from the form of an oath given by a statute, and substitute equivalent words. That decision was upheld by the Court of Exchequer Chamber; and there was no appeal to the House of Lords; although we all know the decision subjected the defendant to the severest penalties; and he was the representative of a numerous class of her Majesty's subjects, who were interested in having the question finally settled. I find no authority in which the contrary has been held; for in none was it laid down that in an oath of office you are at liberty to depart from the oath, and substitute synonymous words. A party is not at liberty to translate an oath.

I agree therefore with my Brother FITZGERALD that we are not at liberty to enter into the consideration of what is synonymous to words which are part of an oath prescribed by a statute. In my opinion, the plaintiff has failed to comply with a distinct, imperative mandate of the Legislature; but I am glad my LORD CHIEF BARON and my Brother HUGHES have been able to come to a different conclusion; for there is no doubt that substantially the plaintiff has been duly appointed, and that he has been disturbed in his office of weighmaster.

H. T. 1862.  
*Erequeuer.*

MAHER v. PURCELL.

Jan. 28.

THIS was a motion that the demurrer filed by the defendant to the first three paragraphs of the summons and plaint might be set aside as irregular.

The action was brought upon a covenant in a deed. The three first paragraphs stated the alleged covenant in various ways.

Demurrer as follows:—The said Michael Purcell the defendant appears, and craves leave to refer the Court to the deed adverted to in the summons and plaint, and which, for the sake of avoiding prolixity and expense, the defendant does not set out *in hoc verba*, but brings the same into Court, for the inspection and perusal of the Court; and the defendant says that the said deed is not sufficient in law for the plaintiff to have or maintain the several causes of action set forth in and by the first, second and third counts of the summons and plaint respectively, against the defendant; because he says that the said causes of action are one and the same, and are founded upon the said deed, and that the said deed does not contain any covenant, either express or implied, by or on the part of the defendant, to pay to the plaintiff any or either of the said sums sought to be recovered against the defendant by the said first, second or third counts respectively, and that he the defendant is not bound to answer the same.

Where, in an action of covenant upon a deed, the defendant, who had the deed in his custody, pleaded by referring to the deed, making *proferet* of it, and then demurred to the summons and plaint, on the ground that the deed contained no such covenant as that sued upon,

The Court set aside the demurrer as irregular.

*William O'Brien*, in support of the motion.

The course taken by the plaintiff is founded upon a misapprehension of the cases of *Armstrong v. Turquand* (a), and *The Guardians of the Nenagh Union v. Armstrong* (b). None of the cases warrant a demurrer of this kind. Before the Court can look at the deed relied on in the defence, they must have it ascertained that it is the deed on which the plaintiff declares. That is not ascertained. Prior

(a) 9 Ir. Com. Law Rep. 32.

(b) *Ibid*, x.

H. T. 1862. *Eschequer.*  
**MAHER**  
**v.**  
**PURCELL.**

to the Common Law Procedure Act of 1853, which by section 63 abolishes the necessity of *profert*; if a party relied upon a deed, he was, in ordinary cases, bound to make *profert* of it; and then the opposite party might crave *oyer*, and set out the deed, and treat it as a part of the pleading of him who relied upon it. But there might, in cases where by law a *profert* was necessary, be a sufficient reason for dispensing with it. It was a sufficient reason to state that it was lost, or that it was in the hands of the opposite party: *Jevens v. Harridge* (a); *Hyde v. Watts* (b). What has happened here is exactly analogous. The deed is in the hands of the defendant, and it cannot therefore be treated as incorporated in the summons and plaint. The English Common Law Procedure Act (15 & 16 Vic., c. 76, s. 56, enacts that a party pleading "in answer to any pleading "in which any document is mentioned or referred to, shall be at "liberty to set out the whole, or such part thereof as may be material; and the matter so set out shall be deemed and taken to be "part of the pleading in which it is set out." In *Sim v. Edmonds* (c) an action was brought upon an award, which was not correctly stated in the declaration. The defendant set out the award, and demurred. It was held that this demurrer was irregular, because, under the Common Law Procedure Act, it became part of the pleading in which it was set out. The circumstances here are analogous.—[FITZGERALD, B. You say *Sim v. Edmonds* shows that if the deed set out is to be considered as part of the pleading of the party demurring, the demurrer is irregular; and though *Sim v. Edmonds* proceeds upon a distinction between the English and Irish Acts, yet it proceeds upon a distinction analogous to circumstances existing here.]—There is no *oyer* here—no certified copy, nor anything ascertaining the instrument. We cannot take issue upon it. If the defendant means to contend that the deed has not the legal effect attributed to it, he should plead *non est factum*: *Snell v. Snell* (d), where Bayley, J., says:—"If a plaintiff states "the legal effect of a deed, the defendant has a right to sue it on "oyer; and if the meaning varies from that attributed to it in the

(a) 1 Saund. 9, a.

(b) 12 M. &amp; W. 254.

(c) 15 C. B. 240.

(d) 4 B. &amp; C. 749.

"declaration, in order to take advantage of that variance he should  
 "plead *non est factum*." Suppose the plaintiff proceeds upon a lost  
 deed, he would be entitled to recover without showing it was lost  
 in his declaration; or suppose the deed stated in the defendant's  
 pleading was an altered deed, the plaintiff would be without remedy,  
 if the defendant produced it in its altered state.

H. T. 1862.  
*Eschequer.*  
**MAHER**  
 v.  
**PURCELL.**

*Edward Johnstone, contra.*

The course taken is the same as that followed in *Fitzpatrick Pine* (a), in this Court. There an action was brought for trespass. The defendant relied on, and set out partially, an order of Justices under the Grand Jury Acts, authorising him to go upon the plaintiff's lands. The plaintiff demurred, setting out the entire of the document; and the Court gave judgment upon that document for the plaintiff.

PIGOT, C. B.

This proceeding has been taken in entire inadvertence to the principle upon which the decisions cited to us were made. *Armstrong v. Turquand* (b) and *The Guardians of the Nenagh Union v. Armstrong* (c) have been already referred to. *Fitzpatrick v. Pine* is not reported; but it follows exactly the decision in *Armstrong v. Turquand*, the only difference being that the instrument in the latter case was a deed, and in the other an instrument not under seal. In each of those cases the party who demurred was the party who was entitled to the production of the document; and the party whose pleading was demurred to was the party who had the document—who relied upon it, and who was bound to produce it. In *Fitzpatrick v. Pine*, the action was for trespass against a person who had taken some gravel; and the defendant relied on an order of Magistrates, under the Grand Jury Acts, which was set forth shortly in the defence. We held there that the plaintiff was entitled to take advantage of the instrument referred to and

(a) Not reported; see now *ante*, p. 32. (b) 9 Ir. Com. Law Rep. 32.

(c) Cited, 9 Ir. Com. Law Rep. 46.

H. T. 1862. produced by the defendant, which, for the purposes of the argument  
*Eschequer.* and decision, we treated as incorporated in the defence.

MAHER  
 v.  
 PURCELL.

This is the converse of each of those cases. If we should allow the course adopted in the present case to succeed, we should involve the plaintiff in this difficulty, that he would be prevented from disputing, as a matter of fact, that the deed referred to in the demurrer was the same instrument upon which he himself relies, and should conclude him, upon the mere statement of the defendant, who has the instrument, that what the defendant describes was that instrument, and no other, upon which the controversy arose. The plaintiff declares upon a certain instrument, and the defendant seeks to have that instrument produced. The plaintiff says the defendant has it; and the defendant contends that he is entitled to affirm (and by affirming, in the shape of a demurrer, to preclude his adversary the plaintiff from denying) that the instrument produced by the defendant is the instrument which the plaintiff says that the defendant has. What, if it is *not* the same? What, if it be a forgery? What, if it contain some, but not all, of the contents of the true instrument? What, if it be interpolated in a material part? How is that to be determined? To yield to the defendant's argument would be to allow a pleading to be resorted to which, according to the exigency, might be treated as a plea in one sense, and as a demurrer in another—an allegation of fact, together with an objection in point of law analogous to what, under the old procedure in Chancery used to be called "speaking demurrers." It is impossible to deprive the plaintiff of his right of disputing that this is the deed on which he relies. The defendant might have shown the deed, or have given a copy of it to the plaintiff, requiring him to say, "is that the deed upon which you declare?" or he might have asked him to consent that that instrument should be treated as the instrument upon which he relied; and if he so consented, the case would then be the same in effect as *Armstrong v. Turquand*. There was no controversy there as to the instrument upon which the plaintiff relied. This is in every respect the direct converse of that case, and is an attempt to introduce a new practice, which would make pleadings confused as well as prolix, and would present a state of things

without any sort of analogy to the former practice of *oyer*. If the defendant has a deed upon which the plaintiff declares, and he relies upon a portion of it, he may refer to the deed in his defence, setting forth the portion of it on which he relies, and thus giving the plaintiff the opportunity of enforcing its production, and if it be not the genuine instrument, of adopting such course as he may be able to pursue, for the purpose of obtaining access to that instrument. If it be the genuine instrument, and if it sustains the plaintiff's case, then the plaintiff ought to have the opportunity of presenting that view of his case to the Court, by a demurrer to the defence.

The resistance to this motion is quite untenable. We need not go into the examination of the statute, or the views which we discussed in *Fitzpatrick v. Pine*. Perhaps it may be said that the demurrer in that case was also a speaking demurrer; but that objection was not there taken.

H. T. 1862.  
*Exchequer.*  
MAHER  
v.  
PURCELL.

BERGIN v. WARBURTON.

E. T. 1862.  
May 7, 8, 13.

By deed dated the 29th of June 1837, the principal officers of her Majesty's Ordnance demised to John Warburton, and his heirs, part of the lands of Crinkhill, situate in the barony of Ballybritt and King's County, to hold for three lives, with a covenant for perpetual renewal, at the yearly rent of £58. 15s. 1d. The proviso for re-entry was, "That if the said reserved yearly rent or any part

Where a right of entry for breach of covenant, in a lease for lives renewable for ever, accrued to the reversioner, prior to the sale of his interest in the Landed

*Estates Court.*—*Held*, that such right of entry did not pass to the purchaser of the reversion under the conveyance of the lands from the Landed Estates Court, and that ejectment for the forfeiture could not be maintained.

The conveyance from the Landed Estates Court granted the lands "subject to the lease."

*Per Proor, C. B.*—The saving of the lease in the conveyance amounted to a stipulation binding on the purchaser, that the lease was, at the date of the conveyance a subsisting interest for lives renewable for ever.

E. T. 1862. *Exchequer.*  
BERGIN  
 v.  
 WARBURTON

“thereof shall be behind and unpaid for or by the space of thirty  
 “days next over or after any of the said days whereon the same  
 “ought to be paid as aforesaid, or if there shall be a breach or  
 “nonperformance of all or any of the covenants in these presents,  
 “or in any renewal of the same, contained or to be contained on  
 “the part of the said lessee, his heirs and assigns, to be performed  
 “and kept, that then and in such case it shall and may be lawful  
 “to and for the said principal officers of her Majesty’s Ordnance,  
 “and their successors principal officers of her Majesty’s Ordnance,  
 “or their assigns, into the said demised lands, or any part thereof  
 “in the name of the whole, to re-enter and the same to have again,  
 “re-possess and enjoy, as in their, his, or their first or former estate,  
 “and as if these presents had never been made or executed, any-  
 “thing herein contained to the contrary thereof in anywise  
 “notwithstanding.” And the said John Warburton covenanted  
 as follows, “That the said John Warburton or his heirs shall  
 “not, at any time hereafter during the continuance of this demise,  
 “or any renewal thereof, assign, alien, demise, underlet, or in  
 “any manner dispose of the said demised premises, or any part  
 “thereof, without the consent in writing of them the said principal  
 “officers of her Majesty’s Ordnance, or their successors principal  
 “officers of her Majesty’s Ordnance, or their assigns, for that  
 “purpose first had and obtained; it being the true intent and  
 “meaning of the said parties to these presents that no person or  
 “persons shall, at any time hereafter, become tenant or tenants  
 “of or entitled to the possession of the said premises or any part  
 “thereof, without the consent in writing of the said principal  
 “officers of her Majesty’s Ordnance, or their successors principal  
 “officers of her Majesty’s Ordnance, or their assigns, for that  
 “purpose first had and obtained, other than such person or per-  
 “sons as shall or may, upon the death of the said John Warburton  
 “or his heirs, for the time being become entitled thereto, or his  
 “heir-at-law.”

By a memorandum of agreement dated the 18th of February  
 1860, made between the said John Warburton and Joseph Edwards,  
 the said John Warburton “agreed to let, and the said Joseph

"Edwards agreed to take and hold of him, as tenant for ten years, E. T. 1862.  
 "commencing on the 1st day of March next, all that part of the *Eschequer.*  
 "lands of Crinkhill, containing thirty acres," at the rent of £90. **BERGIN**  
 v.  
**WARBURTON**

Joseph Edwards entered under this agreement, and paid the rent reserved. The rent due in March 1861 appeared by the receipt to have been paid on the 25th of February 1861.

The interest in the reversion, expectant on the the lease of the 29th of June 1837, was sold in the Landed Estates Court, in the year 1861, and Daniel J. Bergin became the purchaser, for the sum of £1060; and accordingly, by deed dated the 11th of May 1861, Charles James Hargreave, one of the Judges of the Landed Estates Court, granted to D. J. Bergin "That part of the town and lands of Crinkhill, "situate in the barony of Ballybritt, and King's County, containing "48a. Or. 35p., and 14 yards, statute measure, with the appurtenances," subject amongst other matters "to a certain indenture of "lease bearing date the 29th of June 1837, and made between the "principal officers of her Majesty's Ordnance of the one part, and "John Warburton of the other part, for three lives renewable for "ever, at the yearly rent of £58. 15s. 1d., payable half-yearly on "every first day of January and first day of July in every year." The deed also granted to the purchaser all arrears of rent which had accrued and become payable out of the premises thereby conveyed, since the 11th of May 1860, so far as the same still remained due and unpaid.

On the 19th of June 1861, Daniel Joseph Bergin, the purchaser, brought his ejectment on the title, against John Warburton, for a forfeiture.

In the summons and plaint, title was stated to have accrued on the 18th of June 1861.

At the trial before the Lord Chief Justice of the Common Pleas, at the Spring Assizes of 1862, for the King's County, proof was given of the lease of the 29th of June 1837, the conveyance from the Landed Estates Court, the agreement with Edwards of the 18th of February 1860, and several letters between the parties, including one from the defendant, prior to the conveyance by the plaintiff, stating that the farm was then let at £90 a-year. Evidence was



E. T. 1862. also given of the possession of Edwards under the agreement.  
Eschequer. It appeared that the plaintiff had purchased and entered into  
 BERGIN receipt of rent a considerable time prior to the execution of his  
 v. WARBURTON conveyance.

Upon these facts each party called upon the learned Judge for a direction in his favor.

The Lord Chief Justice directed a verdict for the plaintiff, to be turned into a verdict for the defendant if he should have so directed, or if the jury should have found in defendant's favor any question he ought to have submitted to them; the Court to be at liberty to draw any inference the jury ought, on any question he ought to have left to them.

A conditional order having been obtained on behalf of the defendant in the terms of this reservation, cause was now shown against that conditional order.

*G. Battersby, D. C. Heron and C. Palles, for the plaintiff.*

Under the Subletting Act (2 W. 4, c. 17), the agreement and letting from Warburton to Edwards was void. The receipt of rent created a tenancy from year to year only; and the continuance of Edwards' possession after the conveyance in the Landed Estates Court was a continuing breach of the covenant against sub-letting. But, irrespectively of the Subletting Act, Edwards' continuing possession was, from the terms of his covenant, a continuing breach. The words of the covenant were, that Warburton should not assign, &c., "*or in any manner dispose of,*" the premises, "it being the true intent and meaning of the parties to these presents that no person or persons shall, *at any time hereafter*, become tenant or tenants of, or entitled to the possession of," &c. &c. Therefore there was, after the conveyance to the plaintiff, a breach of the covenant, *de die in diem*, so long as Edwards continued in possession, for he was then a tenant; and a disposition of the lands had been made by the defendant. But even if the breach had been complete before the conveyance, and if there had not been a continuing breach after the conveyance, still the right of re-entry for the former breach would have passed by the con-

veyance. By 10 *Car.* 1, sess. 2, c. 4 s. 1, it was enacted that assignees should have the same advantage against lessees, by entry for non-payment of the rent, or for doing of waste or other forfeiture, as the grantors might have had, in the same manner as if the reversion had remained in the said grantors; and by the 87th section of the Landed Estates Court Act (21 & 22 *Vic.*, c. 72), it is enacted that the person to whom a conveyance in that Court shall be made shall have the like advantages "against the lessees, *under-lessees and tenants*," by distress or by entry, for non-payment of rent, or for doing of waste or other forfeiture, as the person granting such lease or under-lease "ought to have had and enjoyed at any time or times, in like manner and form as if the reversion in such land expectant on such lease, under-lease and tenancy, had remained or continued in such person granting such lease or under-lease."

E. T. 1862.

*Eschequer.*

BERGIN

v.

WARBURTON

This also cited the 12th section of 23 & 24 *Vic.*, c. 154 (Landlord and Tenant Consolidation Act).

Serjeant *Sullivan*, *J. T. Ball* and *L. S. Montgomery*, for the defendant.

This was not a continuing breach. No new relation existed between Warburton and Edwards, after the conveyance in the Landed Estates Court, which did not exist between them previously. One test of whether a particular breach is a continuing breach is, whether it is capable of waiver? *Baker v. Jones* (a). In that case it was held that the receipt of rent is no waiver of a continuing breach; but a breach of covenant against subletting was, and would still be capable of waiver by receipt of rent, but for a particular statute, which declares that a waiver of such breach must be by consent in writing. That written consent may be given before the breach, or at any period after the breach: *Walker v. Crommelin* (b), cited in *Penny v. Gardiner* (c). Therefore the subsequent written consent of the landlord waives the breach; that could not be so if it were a breach *de die in diem*. This is different from a breach of cove-

(a) 5 Exch. 498.

(b) 4 Ir. Law Rec. 115, 120.

(c) AL. &amp; Nap. 345.

E. T. 1862. *Exchequer.*  
**BERGIN**  
*v.*  
**WARBURTON** *Maddock v. Mallett* (a): but if damages were recovered for one particular subletting, no second action would lie. Then the question is, can the plaintiff take advantage of a breach committed before the conveyance to him? and it is clear, on the authorities, that he cannot: *Hunt v. Bishop* (b); *Hunt v. Remnant* (c). Besides, on the policy of the enactments of the Landed Estates Court Act, this right of re-entry cannot be considered as having been conveyed to the plaintiff. The policy of that Act was to prevent litigation, with regard to the property sold under its provisions: and it would be strange if it could be considered as conveying a cause of action. The lands in question were sold subject to the lease of 1837. The Judges of that Court have full and very extraordinary powers of inquiring into the state of the property they are about to sell, and the tenancies affecting it; and it must be presumed that in this case the Court made all such inquiries, and satisfied themselves that the lease was a subsisting lease at the time of the sale. It is impossible to maintain that the Court would have conveyed it as a subsisting lease, if it was liable to be put an end to immediately afterwards by ejectment. The 58th section of the Act enables the Judges, if they think fit, to assign arrears of rent to the purchaser; but if the construction sought to be given to the 87th section, on behalf of the plaintiff, were correct, the purchaser would have been entitled to all arrears of rent without any such assignment; and the Court could not have dealt with them.

*Cur. ad. vult.*

**PIGOT, C. B.**

*May 13.*

This was an ejectment brought upon a proviso in a lease, giving the lessors and their assigns a right of re-entry for breach of a covenant. The lease bore date the 29th of June 1837, and was executed by two principal officers of the Ordnance, under the 1 & 2 G. 4, c. 69, s. 4, and 2 W. 4, c. 25, s. 9. By it the lands in question were

(a) 12 Ir. Com. Law Rep. 173.

(b) 8 Exch. 675.

(c) 9 Exch. 635.

demised to John Warburton, for three lives, with a covenant for perpetual renewal, at a rent payable on every 1st of January and 1st of July. The proviso (which was at the end of the usual clause of re-entry for non-payment of rent) was in these words:—"If there shall be a breach of any, or non-performance of all or any, of the covenants in these presents, or any renewal of the same, contained or to be contained, on the part of the said lessee, his heirs or assigns, to be performed and kept, that then and in such case it shall and may be lawful to and for the said principal officers of her Majesty's Ordnance, and their successors principal officers of her Majesty's Ordnance, or their assigns, into the said demised lands and premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess and enjoy, as in their, his, or their first or former estate, and as if these presents had never been made or executed, anything herein contained to the contrary thereof in anywise notwithstanding." The lease contained a covenant of the lessee for himself, his heirs, executors, administrators and assigns, "to and with the said principal officers of her Majesty's Ordnance, and their successors principal officers of her Majesty's Ordnance, and their assigns,"—"that the said John Warburton or his heirs shall not, at any time hereafter during the continuance of this demise, or any renewal thereof, assign, alien, demise, underlet, or in any manner dispose of the said demised premises, or any part thereof, without the consent in writing of them the said principal officers of her Majesty's Ordnance, or their successors principal officers of her Majesty's Ordnance, or their assigns, for that purpose first had and obtained; it being the true intent and meaning of the said parties to these presents that no person or persons shall, at any time hereafter, become tenant or tenants of or entitled to the possession of the said premises, or any part thereof, without the consent in writing of the said principal officers of her Majesty's Ordnance, or their successors principal officers of her Majesty's Ordnance, or their assigns, for that purpose first had and obtained, other than such person or persons as may, upon the death of the said John Warburton,

E. T. 1862.

*Exchequer.*

BERGIN

v.

WARBURTON

**E. T. 1862.** “or his heirs, for the time being, become entitled thereto as his Eschequer. “heir-at-law.” The plaintiff in this action became the purchaser, **BERGIN** in the Landed Estates Court, of the estate in the lands comprised **v.** in the lease of the officers of the Ordnance. The conveyance from **WARBURTON** the Judge of the Landed Estates Court was dated the 11th of May 1861. By an instrument dated the 18th of February 1860, which, it was admitted at both sides, operated as an agreement, and not as a demise, Warburton, the lessee of the lease of 1837, agreed to demise to Joseph Edwards a part of the premises comprised in the lease, for a term of ten years, at the yearly rent of £90, payable on the 1st of March and 1st of September in each year. Edwards occupied in pursuance of that agreement, and paid the rent mentioned in it. The last payment of this rent next preceding the conveyance from the Judge of the Landed Estates Court was made on the 25th of February 1861: the first was paid on the 7th of September 1860. In the ejectment the title was stated to have accrued on the 18th of June 1861.

Upon these facts it is clear that there was a breach of the covenant, and that the right of re-entry accrued to the officers of the Ordnance, as legal owners of the reversion before the conveyance from the Judge of the Landed Estates Court to the plaintiff. The question therefore is raised directly, upon the facts so appearing, whether that right of entry was, by the conveyance, transferred to the plaintiff? If so, he is entitled to recover in this ejectment. But, before I consider that question, I wish to dispose of another, which was presented to us in two views:—First; it was contended, on the part of the plaintiff, that, under the Subletting Act (2 W. 4, c. 17), the agreement, and the letting by means of the agreement, and of the payment of rent under it, from Warburton to Edwards, were void; that the continuance of Edwards in possession for each successive day was a continuing breach of the covenant by the successive creations, at least of a tenancy at will; and that consequently a new right of re-entry accrued after the conveyance of the 11th of May 1861. This topic was the subject of much discussion at both sides, on the assumption that the Subletting Act applied. It is unnecessary to advert to any of the arguments on that subject

further than to say that the assumption fails on which they were all founded. The Subletting Act does not apply. The lease of the 29th of June 1837 contains a demise for lives, with a covenant for perpetual renewal; and such a lease is excepted from the operation of the Subletting Act (2 W. 4, c. 17, by the 11th section).

E. T. 1862.  
*Eschequer.*  
 BERGIN  
 v.  
 WARBURTON

Secondly; a question arose whether, irrespectively of the Subletting Act, and under the terms of the covenant, there was not a continuing breach, by reason of the continuing possession of Edwards after the conveyance of the 11th of May 1861? The covenant consists of two parts: the first is that in which the lessee covenants that he will not "assign, alien, demise, underlet, or in any manner dispose of" the premises, or any part thereof, &c. Each of these words of covenant contemplates not the mere parting with possession, but the conferring of a title; and they are so expounded by the subsequent words; for the second part of the clause containing the covenant declares the meaning of the parties to be, that "no person or persons shall, at any time hereafter, become *tenant* or *tenants*, or" (*not shall obtain, or shall have possession, but shall be*) "*entitled* to the possession of the said premises, or any part thereof," without the consent in writing, &c. We cannot hold that these latter words import mere possession, without striking out the words "or entitled to," and substituting "or have," or some equivalent terms. The terms "or entitled to" show that, by the previous words of express covenant, the parties contemplated binding the lessee not to confer a *title* to the lands, or any part of them, by "assigning, aliening, demising, underletting, or in any manner disposing of" the lands, or any part thereof. The transaction of the agreement between Warburton and Edwards, and the subsequent payment of rent under it, created at law a tenancy from year to year, upon the terms of the agreement, so far as it were consistent with such tenancy. As between Warburton and Edwards, that agreement, and the tenancy under it, not being avoided by the Subletting Act, were valid and binding, and continued to influence the possession before and after the conveyance of the 11th of May 1861. It was not competent to Warburton to revoke or annul the interest which he had conferred on Edwards. No

E. T. 1862.  
*Exchequer.*

BERGIN  
v.

WARBURTON

new relation was, subsequently to the conveyance of the 11th of May 1861, created between Warburton and Edwards. No new title was conferred on Edwards; no new disposition of the lands was made to him. The Landlord and Tenant Consolidation Act, 23 & 24 *Vic.*, c. 154 (if applicable at all to such a case as this) could not affect a dealing made prior to it.—[See section 104]. The dealing between Warburton and Edwards, in contravention of the covenant, was the execution of the agreement of the 18th of February 1860, or, at the latest, the payment and acceptance of rent under it, that agreement creating a tenancy from year to year; and whatever breach of covenant was thereby committed was then complete. The case must therefore be treated as one in which a single breach of the covenant was committed, or in which the last breach took place when, by acceptance of rent, that tenancy from year to year at law was created between Warburton and Edwards which has since subsisted.

This reduces the controversy to the question which I first mentioned, namely, whether the right of entry which accrued to the officers of the Ordnance on the breach of the covenant before the conveyance of the 11th of May 1861, was transferred to the plaintiff by that conveyance? and with that question I now proceed to deal.

The statute which regulates the rights of assignees of reversions, in Ireland, is the 10 *Car.* 1, sess. 2, c. 4, s. 1,\* analogous to the 22 *Hen.* 8 (*Eng.*), c. 34, s. 1. The difference in dealing with assignments of reversions, between these two statutes, which is

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\* 10 *Car.* 1, sess. 2, c. 4, s. 1.— . . . . . “ Shall and may have and enjoy like advantage against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture; and also shall and may have and enjoy all and every such like and the same advantage, benefit and remedies, by actions only, for not performing other conditions, covenants and agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said leases, and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantees themselves, or their heirs or successors, ought, should or might have had and enjoyed, at any time or times, in like manner and form as if the reversion of such lands, tenements or hereditaments, had remained and continued in the said grantors or lessors, their heirs or successors.”

chiefly in the words at the close of the first section of each statute, does not, I apprehend, affect their construction; substantially the legislation, in reference to covenants and forfeitures, is the same. The portion of the 1st section of the Irish statute which applies to the present case is—[His Lordship read it.]—It is quite clear that if this were an assignment of the reversion made by the principal officers of the Ordnance to the plaintiff, the right of entry, which accrued while the reversion was vested in those officers, would not have passed by the assignment. It is unnecessary to cite an authority for a proposition so plain. I shall merely observe that it was assumed in the arguments and judgments in the recent cases of *Hunt v. Bishop* (a) and *Hunt v. Remnant* (b). Let me now compare the 1st section of the Irish statute, 10 *Car.* 1, sess. 2, c. 4, with the 87th section of the Landed Estates Court Act, 21 & 22 *Vic.*, c. 72.\* The corresponding words of that section are these.—[His Lordship read it; pointing out the words introduced into the 87th section of the Landed Estates Court Act, which are not in the 1st section of the Irish statute 10 *Car.* 1, sess. 2, c. 4.]—The 87th section of the Landed Estates Court Act has the words “under-lessees and tenants;”—“and under-tenants;”—“and against all other persons in possession of the land

E. T. 1862.  
*Exchequer.*

BERGIN  
v.

WARBURTON

(a) 8 Exch. 675.

(b) 9 Exch. 635.

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\* 21 & 22 *Vic.*, c. 72, s. 86.—“And the person to whom such conveyance or assignment is made, his heirs, executors, administrators and assigns, and every of them, shall and may have and enjoy the like advantages against the lessees, under-lessees and tenants, their heirs, executors, administrators, assigns and under-tenants, and against all other persons in possession or occupation of the land comprised in such conveyance or assignment, by distress or by entry for non-payment of rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy like advantages and remedies by action for not performing other conditions, covenants and agreements contained in such lease or under-lease, or in the parol agreement for such tenancy, against the said lessees, under-lessees and tenants, their heirs, executors, administrators and assigns, as the person granting such lease or under-lease, or as the landlord entering into the agreement for such tenancy, or his heirs, executors, administrators or assigns, ought to have had and enjoyed at any time or times, in like manner and form as if the reversion in such land expectant on such lease, under-lease and tenancy, had remained or continued in such person granting such lease or under-lease, or as landlord entering into such agreement.”



E. T. 1862. comprised in such conveyance or assignment, by distress." It<sup>1</sup>  
**Exchequer.** has also the words "or in the parol agreement for such tenancies."  
**BERGIN** There are some few other small differences ; but substantially,  
**v.**  
**WARBURTON** and in the far greater portion *literally*, the sections are the same ; save that the 87th section of the Landed Estates Court Act transfers the remedies against under-lessees and under-tenants, and against persons holding under parol agreement. The object of the provision in reference to agreements plainly was, to include amongst those against whom the remedies for waste or forfeiture, or on other grounds (if any) of claim existed for the assignor, all persons holding under contracts which do not amount to a demise ;—a class of persons of whom little account was taken when the English Parliament passed the 32 *Hen.* 8, c. 34, of which the Irish statute of 10 *Car.* 1, sess. 2, c. 4 was, to a great extent, a transcript. The use of language, in the 87th section of the Landed Estates Court Act, identical (save as to the small differences which I have noticed, and which on the subject now before us do not affect the construction) with that of the corresponding section in the statute 10 *Car.* 1, sess. 1, c. 4, appears to me to show, that the plain intention of the Legislature was to transfer the reversion, by means of the conveyance from the Judge of the Landed Estates Court to the purchaser, in the manner in which it would have been transferred by the assignment of the owner of the reversion to his assignee. No reason that I can see, can be found in the Landed Estates Court Act, for a larger construction. Upon the terms, therefore, of the 87th section of that statute alone, I should hold that the construction of the two statutes ought to be the same. But the Landed Estates Court Act itself furnishes a distinct reason for giving to it the same construction as to the statute regulating the rights of assignees under assignments from the owners of reversions. The Landed Estates Court Act gives to the Court the power, in certain cases,\* to transfer to the purchaser the arrears due by the lessees or tenants, subject to whose leases or tenancies the sale is made by the Court. But the Court may not deem it fit so to transfer the arrears. And if it do not transfer them, the purchaser has no title to them. It

\* See section 58.

would be plainly impossible to give to the 87th section the force of transferring a right of entry for non-payment, during the ownership of the former owner of the reversion, of rent which had accrued while he was such owner. But the 87th section contains no exception of that case from its provisions. If the Legislature considered that, by the terms of the 87th section, a right of entry for forfeitures which had accrued prior to the conveyance of the Judge of the Landed Estates Court was transferred to the purchaser, it would have necessarily guarded and limited the 87th section, by providing that it should *not* apply to transfer a right of re-entry for non-payment of rent, the arrears of which did *not* belong to the purchaser. And the absence of any such limiting or qualifying provision constitutes a strong reason for holding that the Legislature did not deem it necessary to *express* any such qualification, because they did not *intend*, by the 87th section, to transfer any right of entry at all which had accrued to the former owner of the reversion; and because they contemplated, in that section, transferring such rights only as the owner of the reversion, at a time subsequent to the conveyance, would have acquired if the conveyance had not been made. The words at the close of the 58th section show plainly that the Legislature did not consider that, by the 87th section, a right would be transferred by the conveyance to the purchaser, of suing upon a covenant to pay rent, for past breaches of that covenant which had accrued before the conveyance was executed to him. For these reasons, founded on a similarity, and almost identity in substance and in form, of the 1st section of the 10 *Car.* 1, sess. 2, c. 4, and the 87th section of the Landed Estates Court Act (a view of the statutes for which, mainly, I am indebted to the suggestions of my Brother FITZGERALD), [I think this ejectment cannot be maintained upon the forfeiture, or right of re-entry, which accrued while the officers of the Ordnance were the legal owners of the reversion.

But further, I should, as at present advised, be prepared to hold, if necessary for our decision, that, upon the frame of the conveyance from the Judge of the Landed Estates Court, and upon its true construction, a right of entry, for a forfeiture by which the

E. T. 1862.

Eschequer.

BERGIN

v.

WARBURTON

**E. T. 1862.** lease could be avoided *at the time of the conveyance*, did not pass by it. By the Act of the 21 & 22 Vic., c. 72, the Landed Estates Court has the jurisdiction to determine whether it will or will not sell the lands subject to leases; and to determine what shall be the leases subject to which it shall sell. By the conveyance of the 11th of May 1861, the Judge of the Landed Estates Court conveyed the lands expressly subject to the lease of the 29th of June 1837; which, in the conveyance, was specified by the date and parties, names, and was described as a lease for three lives renewable for ever. Regard being had to the power which the Court in effect had, of confirming or annulling the lease for the purposes of the sale, it appears to me to be inconsistent with the saving of the lease, to hold that it was, at the time of the conveyance, and after the conveyance, liable to be defeated for a forfeiture previously incurred. In conveying and accepting the lands subject to the lease, there appears to me to have been a plain and unequivocal declaration, by the parties to the conveyance, that the lease was a subsisting lease for lives renewable for ever. I do not think it can be considered, by any reasonable intendment, that it was a subsisting lease for lives renewable for ever, or that it could have been so dealt with, if it was, at the time of the conveyance and afterwards capable of being at once terminated by the mere ceremony of bringing an ejectment. In *Hunt v. Bishop* (a), in the Court of Exchequer, and in *Hunt v. Remnant* (b), in the Court of Exchequer Chamber, this very question arose; but it was not necessary to decide it. In *Hunt v. Bishop*, however, Lord Chief Baron Pollock, in his judgment, adverts to the circumstance that "the deed of conveyance expressly conveys the property subject to the under-lease," and adds, "but then it was said, that the assignment was no waiver of the forfeiture, because the assignor did not know of it. We very much doubt whether, on that ground, it would be competent to the assignee to take advantage of the forfeiture." He then proceeds to rest the judgment of the Court on the ground that, by the 8 & 9 Vic., c. 106, a right of entry for a condition which had been broken does not pass by the assignment

(a) 8 Exch. 675.

(b) 9 Exch. 635.

of the reversion. The Court accordingly expressed no decisive opinion upon the effect of an assignment of a reversion subject to an under-lease. The case therefore is not an authority upon that point. But the inclination of their opinion appears pretty plainly to have been in favor of the conclusion that the saving of the under-lease would have been sufficient to preclude the assignees from maintaining an ejectment for condition broken previously to the assignment. In the present case, the correspondence referred to in the notes of the Lord Chief Justice shows that the sub-demise from Warburton to Edwards was known to the plaintiff before the conveyance. But there was no evidence proving either that it was known to him at the time of the sale, or that it was brought to the notice of the Landed Estates Court; and as this matter of the notice of the forfeiture was not discussed before us, or relied on at the trial, I abstain from further observing upon it. I must say, however, that having regard to the powers of inquiry which the Landed Estates Court have, for ascertaining how the lands are occupied and dealt with, and to the interest which prompts most men to ascertain the circumstances of the property which they buy, I should, if it were necessary, drawing inferences from facts (which the case as reserved authorises us to do), infer, that the occupation of Edwards was well known at the time when the plaintiff became the purchaser of the lands. In my judgment, however, the saving in the conveyance is, irrespectively of any such notice, an express stipulation that the lands were subject to this lease, as a subsisting lease for lives renewable for ever. And in my judgment the plaintiff, a purchaser under that conveyance, and upon that stipulation, is precluded from now dealing with the lease as having been then liable to be evicted for a forfeiture; entitling the purchaser to treat it, not as a subsisting lease, but as an instrument which he could at pleasure annul, by bringing an ejectment.

In the case of *Lucas v. How* (*Sir Thomas Royle*, p. 250), an opinion was expressed by some of the Judges (though no decision was made upon the point) that the assignee of the reversion cannot take advantage of a condition for re-entry if the lessee shall assign

E. T. 1862.  
*Exchequer.*  
 BERGIN  
 v.  
 WARBURTON

E. T. 1862  
*Eschequer.*  
 BERGIN  
 v.  
 WARBURTON

without license. And there are authorities in support of the proposition, that a covenant or condition so providing is collateral, and does not run with the land. *Serjeant Williams*, in the *note* (17) to the case of *Duppa v. Mayo* (a), states, that from the view of the nature of such a condition, "it seems to follow, that a condition of "re-entry, if the lessee assigns without license, is not within the "statute (32 Hen. 8, c. 34), and that the assignee of the reversion "cannot maintain an ejectment for a breach of such condition, any "more than he could do at Common Law." Whether this proposition be well or ill founded, and whether it is in any manner affected by the Sub-letting Act, are matters which have not been argued before us, and on which it is unnecessary, for the purpose of our judgment, to pronounce any opinion. For the other reasons which I have stated, I think the point saved ought to be ruled with the defendant, and the verdict ought accordingly to be entered for him.

FITZGERALD, B.

I concur in the judgment of my LORD CHIEF BARON, upon the first ground mentioned by him. Upon the second ground, I do not express any opinion. I think there was a complete breach of the covenant in 1860, and that the title to the right of re-entry for that breach did not pass to the purchaser under the 87th section of the Landed Estates Act.

HUGHES and DEASY, BB., concurred.

(a) 1 Sand. 268 c.

E. T. 1862.  
*Common Pleas*

MERCER v. O'REILLY.

(*Common Pleas*).

E. T. 1862.  
May 6, 7.  
T. T. 1862.  
May 30.

THIS was an action for the recovery of arrears of rent. The summons and plaint set forth a lease, whereby, on the 26th of January 1857, the plaintiff demised to John Lynch certain premises, for the term of 100 years from December 28th 1856, at the yearly rent of £46, payable quarterly, on every 25th of March, 25th of June, 25th of September and 25th of December, and whereby J. Lynch covenanted to pay plaintiff the said rent; and it averred an assignment from Lynch to the defendant, and that afterwards seven quarters of said rent became due from the defendant to the plaintiff, amounting in the whole to the sum of £80. 10s., as shown by the particulars endorsed.

The defendant pleaded that the premises were described in said lease as "the piece or parcel of land, being part of the land called "the Farm of Saint Sepulchre,' otherwise 'Saint Pulchre,' with "the messuages and dwelling-house thereon, situate in the parish "of St. Peter, formerly in the county of Dublin, but now in the "county of the city of Dublin, containing in breadth on the east "side 185 feet; in breadth on the west side 137 feet, including "nine feet, the one-half of the stable-lane, on the south side of "said premises; in depth on the north side 192 feet, and in depth

To an action against an assignee, for several gales of rent, due on a lease made before the passing of the Landlord and Tenant Law Amendment Act 1860 (23 & 24 Vic., c. 154), and some of which gales accrued before, and some after, the Act, the defendant pleaded that, during all the time he was assignee, the plaintiff and his under-tenants were in actual possession and occupation, and in the receipt of the rents and profits of a portion of the premises against his will, whereby the defendant

was deprived of the rents and profits of same. The plaintiff replied, setting out the several times when the rent accrued.

*Held*, on demurrer, that the plea was an answer to so much of the action as claimed the rents which accrued due prior to the passing of the Act; but that, with respect to the gales which accrued subsequently, the plea was bad, and that the plaintiff had a right, under section 44,\* to recover a proportion of each of the latter gales.

*Held also*, that the 44th section operates upon contracts of tenancy made prior to, and in force at, the time of the passing of the Act, but only as to future breaches of same.

\* 23 & 24 Vic., c. 154, s. 44.—"The surrender to, or resumption by a landlord, or eviction of any portion of the premises demised by a lease, shall not in any manner prejudice or affect the rights of the landlord, whether by action or by entry or ejectment, as to the residue of said premises."

E. T. 1862. "on the south side 141 feet, including nine feet, the one-half of  
*Common Pleas.* "the stable-lane on the east side of part of said premises, the  
 MERCER "centre of which stable-lane is 199 feet distant from Richmond-  
 v. "street, situate westward of said premises; bounded on the north  
 O'REILLY. "by Mr. Gordon's holding, and on the south and east by an holding  
 "formerly in the possession of Joseph Huband, Esq., as tenant with  
 "Rev. Richard Graves, and on the west by Richmond-street afore-  
 "said." Averment:—That, during all the time the defendant had  
 been such assignee as aforesaid, the plaintiff, by himself and his  
 under-tenant Francis Richard Cotton Walker, and other tenants,  
 had been in actual possession and occupation of a large portion  
 of said premises, against the will of the defendant, whereby the  
 defendant did not and could not enter into the possession of or  
 hold or enjoy the said last-mentioned premises, so in possession  
 of the plaintiff and of F. R. C. Walker and others; and same being  
 parcel of the said demised premises in the plaint mentioned: and  
 the plaintiff, during all the time aforesaid, hath been and still is  
 in actual receipt of the rents and profits of the said last-mentioned  
 portion of said lands, and wrongfully and by force withheld pos-  
 session thereof from said defendant; and although defendant has  
 been always willing and desirous of entering into and upon same,  
 and has always been willing and ready to pay the rent reserved  
 by said lease, on obtaining possession of the premises demised by  
 same, yet he has been wrongfully and by force kept out of pos-  
 session of, to wit, one-half of said premises, by reason of the  
 wrongful acts of the plaintiff, as aforesaid; and defendant has  
 been prevented from receiving the rents and profits of same, solely  
 by reason of the wrongful acts of plaintiff; and plaintiff has violated  
 the covenant for quiet enjoyment in said lease of 26th of January  
 1857, &c.

Replication:—That the several gales of rent become and were  
 respectively due and payable on the several days following—setting  
 forth the dates, which ran from 25th of March 1860 to 25th of  
 September 1861.

The plaintiff demurred to the replication, upon the ground that  
 it was no answer to the defence, and was insensible.

*Ralph* (with whom was *D. C. Heron*,) in support of the demurrer. E. T. 1862.

It is quite clear that, before the recent Landlord and Tenant Act (23 & 24 Vic., c. 154), an eviction of a portion of the entire premises by the representative of the lessor, was a suspension of the rent, and affected the right to sue upon the covenants in the lease, the contract being an entire one: *Meehelen v. Wallace* (a); *Countess of Plymouth v. Throgmorton* (b); *Winter's case* (c), where a distinction is taken between the case of an eviction by title paramount and by the act of the party; 11 *Anne*, c. 2, s. 4; *Taverner's case* (d); *Spencer's case* (e); *Neil v. Mackenzie* (f); 1 *Rolles. Abr.*, p. 234. Then it will be said that this case is provided for by the 44th section of the late Act; but that must be limited to contracts made after the passing of the Act: *Dwarris on Statutes*, p. 520; *M'Areavy v. Hanna* (g). The acts complained of here, as amounting to an eviction, took place before the coming into operation of the statute.

Common Pleas.  
MERCER  
v.  
O'REILLY.

*E. M. Kelly* and *Hemphill*, contra.

The plea does not sufficiently show that the defendant was evicted: *Hodgkins v. Robson* (h). An eviction by title paramount of a portion was, even before the statute, no answer to an action for the rent in respect of the residue of the premises: *Stevenson v. Lambard* (i). There is nothing to show that any more was intended to pass by the lease than the reversion of the portion of the premises out of possession; or that the defendant, or those under whom he claimed, were ever in actual possession of this part: *Salmon v. Smith* (k); *Dunn v. Di Nuovo* (l); *Ecclesiastical Commissioners v. O'Connor* (m); *Morrison v. Chadwick* (n); *Newton v. Allin* (o); *Wheeler v. Stevenson* (p); *Grand Canal Co. v.*

(a) 7 Ad. & El. 54, n.

(c) 3 Dyer, 308, b.

(e) 1 Sm. L. Cas. 41.

(g) Exch., H. T. 1862, not reported.

(i) 2 East. 575.

(l) 3 Sco. N. R. 487.

(n) 7 Q. B. 266.

(b) 1 Salk. 65.

(d) 1 Dyer 56, a.

(f) 1 M. & W. 797.

(h) 1 Ven. 276.

(k) 1 Wm. Saund. 202-4.

(m) 9 Ir. C. L. R. 242.

(o) 1 Q. B. 18.

(p) 6 H. & N. 155.



E. T, 1862.  
*Common Pleas.*

MERCER  
v.

O'REILLY.

*Fitzsimons (a)*; *Smith v. Raleigh (b)*; *Stokes v. Cooper (c)*; *Bullen and Leake on Pleading*, p. 373; 3 *Chitty on Pleading*, p. 777.

Assuming that no action was maintainable for this rent before the late statute, section 44 applies to the present lease. The statute is remedial; and therefore so far as contracts existing at the time are concerned, it operates retrospectively, though it may be otherwise as to breaches of contract: *Hilliard v. Leonard (d)*; *Towler v. Chatterton (e)*; *Freeman v. Moyes (f)*; *Charrington v. Meatheringham (g)*; *Edwards v. Lawley (h)*; *Cornill v. Hudson (i)*; *Doe v. Bramston (k)*; *Doe v. Turner (l)*; *Wright v. Hale (m)*. Several of the sections of the Landlord and Tenant Amendment Act 1860 must necessarily be retrospective; others are in terms prospective. There is nothing to limit the operation of section 44. An eviction is a continuing act; and therefore the Act applies to all gales which accrued since it passed: *Hudson v. Nicholson (n)*; *Holmes v. Wilson (o)*; *Addison on Wrongs*, p. 442.

*Heron*, in reply.

In order to make the statute retrospective it must contain the most express words. *Nova constitutio futuris formam imponere debet, non præteritis*. *Gilman v. Shuter (p)*; *Ashburner v. Bradshaw (q)*; *Attorney-Gen. v. Lloyd (r)*; *Moore v. Phillips (s)*; *Chappell v. Purday (t)*; *Perry v. Skinner (u)*; *Moon v. Durden (v)*; *Broom's Legal Maxims*, p. 29; *Maddock v. Mallett (w)*. The defence sufficiently states the fact of eviction: *Holgate v. Kay (x)*.

*Cur. ad. vult.*

(a) 1 Hud. & Bro. 449.

(c) 3 Camp. 514, n.

(e) 6 Bing. 265.

(g) 2 M. & W. 228.

(i) 8 El. & Bl. 437.

(l) 7 M. & W. 226; S. C., 9 M. & W. 643.

(m) 6 H. & N. 227.

(o) 10 Ad. & El. 503.

(q) 2 Atk. 36.

(s) 7 M. & W. 536.

(u) 2 M. & W. 471.

(w) 12 Ir. Com. Law Rep. 173.

(b) 3 Camp. 513.

(d) M. & M. 297.

(f) 1 Ad. & El. 338.

(h) 6 M. & W. 285.

(k) 3 Ad. & El. 63

(n) 5 M. & W. 437.

(p) 2 Lev. 227.

(r) 3 Atk. 551.

(t) 12 M. & W. 303.

(v) 4 Ex. R. 221.

(x) 1 C. & K. 341.

MONAHAN, C. J.

In this case which, under the old forms of actions, would be an action of covenant, the plaintiff complains, that, by lease, dated the 26th of January 1857, he the plaintiff demised certain premises to John Lynch, for 100 years, at the yearly rent of £46, payable quarterly, on certain days therein mentioned, and that Lynch covenanted to pay the said rent on the said quarterly days of payment; and that, during said term, all the estate of the lessee Lynch became vested in the defendant by assignment; and that since the estate of Lynch so vested in the defendant, seven quarterly gales of said rent became due and payable, and are still due and unpaid. From the endorsement on the summons and plaint, it appears that four of these quarterly payments became due before the month of January 1861, and three became due since January 1861, namely, in March, June and September 1861. To this the defendant pleaded that, during all the time that he the defendant was such assignee as in plaint mentioned, the plaintiff, by himself and his under-tenants, has been in actual possession and occupation of a large portion of the said demised premises, against the will of the defendant, whereby the defendant did not and could not enter into possession; and the plaintiff hath been and still is in receipt of the rents thereof; and plaintiff wrongfully and by force withheld defendant from the possession thereof. To this plea or defence the plaintiff, by way of replication, alleges that the rent sought to be recovered accrued due on the days I have already stated; that is, four quarterly gales became due in March, June, September and December 1860, and three in March, June and September 1861. To this the defendant demurred; and the case has been fully argued before us. It has been insisted by the defendant that his plea is in substance a plea of eviction from part of the demised premises by the landlord, and therefore operates as a suspension of the entire rent. The plaintiff, on the other hand, insisted that the plea did not amount to a plea of eviction; for that it was quite consistent with it, that, at the time of making the lease to Lynch, a portion of the premises was in the possession of tenants of the plaintiff Mercer; and that the lease to Lynch, being by

T. T. 1862.

*Common Pleas.*

MERCER  
v.

O'REILLY.  
May 30.

T. T. 1862.

*Common Pleas.*

MERCER

v.

O'REILLY.

deed, granted the reversion of this part of the premises; and that these tenants, by the operation of the lease, became the under-tenants of Lynch, and of the defendant when he became the assignee of Lynch's interest in the demised premises; and therefore that the law of eviction was not applicable thereto. I confess that I, for one, entertain very serious doubts whether the defendant's plea can be at all considered as a plea of eviction, which implies that the tenant or person evicted has been in the possession of the premises from which he has been evicted; and here it is quite uncertain whether Lynch the tenant was or was not at any time in possession of the premises in question; but it becomes unnecessary for us to decide this question, in consequence of the opinion we have formed on the other part of the case, which is that which has been most fully argued before us, namely, the effect of the recent Landlord and Tenant Act, which came into operation on the 1st of January 1861. By the 44th section of this it is enacted that the surrender to, or resumption by a landlord, or eviction of any portion of the premises demised by a lease, shall not, in any manner, prejudice or affect the rights of the landlord, whether by action or entry or ejectment, as to the residue of said premises. The plaintiff has insisted that, as the present action has been commenced after the passing of this Act, he is entitled to recover the entire rent sued for, though some of it accrued before the Act came into operation; but he further and principally insisted that he is at all events entitled to recover the three quarterly gales which became due since the Act came into operation; and that as the defendant has pleaded his defence in bar to the entire demand of the plaintiff, and it fails as to part, it fails altogether. The defendant on the other hand insists that this clause of the Act does not at all apply to leases made before the passing of it. And he further insists that, even should it apply to such leases and evictions which took place since the act came into operation, that it does not apply to evictions commenced before and continuing after the Act came into operation. And the defendant, in support of this view of the case, has referred to several cases which decide, that, unless the words of a statute are very clear, they are not to be held to vary existing rights; and

accordingly he says, that at the time of the passing of this Act of Parliament his right was, that he should not be liable to pay any rent for any part of the premises, so long as he was evicted from any part, however small. We do not consider the right of a tenant to hold nine-tenths of the demised premises rent free, though he be evicted for the remaining one-tenth, such a vested right as calls for the application of the rule in question; and therefore, as we find several sections of the Act in question in terms applying only to leases made after the commencement of the Act, and other sections not so confined, we are of opinion that the section in question applies as well to leases made before, as after the Act came into operation. The 41st, 42nd and 43rd sections in terms apply to leases made after the Act came into operation; we cannot but think if such was the intention in relation to the clauses immediately following, that it would have been so stated. The 51st section provides that after the commencement of the Act, it shall not be lawful for any landlord to distrain for rent which accrued due more than one year before the making of such distress; we think clearly applying to leases made as well before as after the passing of the Act. On the whole, therefore, having regard to the various provisions of the Act, which we think should have more influence than mere cases decided on other Acts, we are of opinion that the 44th clause of the Act applies to leases made before its passing. But with respect to the gales of rent which accrued due before the Act came into operation, and for which the defendant, by the law as it then stood, was actually discharged, we do not think that the argument of defendant's Counsel is well founded. But with respect to the gales which accrued due since the Act came into operation, we are of opinion that the eviction which would have discharged that rent under the old law was the continuing eviction up to the time it accrued due; which continuing eviction is in the nature of a new eviction: and therefore we are of opinion that such continuing and new eviction comes within the operation of the 44th section of the Act. Our rule therefore will be, to give the defendant liberty to apply to confine his defence to the rent which accrued before the 1st of January 1861; and in default of his so doing, judgment for the plaintiff.

T. T. 1862.  
*Common Pleas.*  
MERCER  
v.  
O'REILLY.

H. T. 1862.  
*Common Pleas.*

COVENTRY v. M'ENIRY.

Jan. 16, 25.

To an action for the price of barley sold and delivered, the defendant pleaded that the barley delivered was inferior to the sample, and that the defendant used a small portion in making malt, which turned out bad and useless, whereupon defendant requested plaintiff to take back the barley, which he refused. He further pleaded that the barley was warranted to be fit for malting; that the barley delivered was unfit for that purpose, and he used a small portion of the barley in making malt, and that the malt made therefrom was of no value; alleging a refusal by the plaintiff to take back the remainder of the barley, which with the malt so made remained still on defendant's premises, and was of no use.

—*Held*, that the pleas were bad, for not showing that the defendant made the trial of quality within a reasonable time after delivery, and that he used only so much of the barley as was sufficient for the trial.

THIS was an action for goods sold and delivered.

The second defence stated that said goods consisted of a quantity of barley for malting purposes; which barley was sold by a sample sent and shown by plaintiff to defendant, the plaintiff warranting that the barley to be delivered by him to the defendant would be of the same description and quality as the sample so sent; that no barley of the same description and quality as the said sample was ever delivered to defendant, but that the barley delivered, being the goods in plaint mentioned, was of a different and inferior description and quality; that defendant used a small portion of said barley in making malt, which turned out to be bad and altogether useless and of no value whatever, of which plaintiff had due notice; and defendant requested him to take back the remainder of said barley, which, with the malt made with the portion used, still remained on defendant's premises, ready to be delivered to plaintiff.

Third defence.—That the only goods sold by plaintiff to defendant were a quantity of barley for the purpose of making malt therewith; and which barley was sold by plaintiff, and purchased by defendant, for that purpose and no other, the plaintiff warranting that the barley to be delivered by him to defendant would be barley fit for making malt therewith; that no barley fit making malt was delivered by plaintiff to defendant; and that the barley delivered, being the goods in plaint mentioned, was altogether unfit for this purpose; that defendant used a small portion of said barley in making malt, and that the malt made therewith was wholly useless and of no value, whereof defendant immediately, and before action brought, gave plaintiff notice, and requested him to take back the remainder of said barley; which, with the malt so made, with the portion used,

still remains on defendant's premises, ready to be delivered to the plaintiff. The plaintiff demurred to the second defence, on the ground that it showed no valid reason for defendant's refusal to pay for the barley used, when the defendant accepted and used the same, or a part thereof; also to the third defence, upon the ground that the defendant admitted the sale and delivery of the barley, and did not allege that he had used only sufficient to enable him to see if it were equal to the warranty; and that it was consistent with said defence that defendant had used all but one barrel of said barley, and that the matter therein stated was only a ground of cross-action.

H. T. 1862.  
*Common Pleas.*  
**COVENTRY**  
**v.**  
**M'ENIRY.**

*Bzham* (with whom was Serjeant *Sullivan*), in support of the demurrer.

It is not alleged in these defences that only a reasonable or necessary portion of the barley was used. The defendant was not bound to accept the entire of the goods, but having altered a portion of it, he must be taken to have accepted the whole. The principle is laid down by Lord Ellenborough, in the case of *Hunt v. Silk* (a). If the defendant had intended to renounce the contract, he ought to have given notice of his intention to the plaintiff: *Chapman v. Morton* (b). There are sufficient facts stated in this defence to establish the fact of acceptance. The general rule is laid down in *Addison on Contracts*, p. 242. He further referred to and distinguished the cases of *Parker v. Wallis* (c), *Poulton v. Lattimore* (d), and *Gardner v. Grout* (e). A vendee is not at liberty to take more than a reasonable quantity for the purpose of testing the goods: *Lucy v. Mouflet* (f).

*R. Ferguson* and *J. Clarke*, contra.

These defences are good in law. Where goods are sold under a warranty, and they turn out when delivered to be different from the kind warranted, the contract may be rescinded. A simple denial

(a) 5 East. 452.

(c) 5 El. & Bl. 21.

(e) 2 Com. B., N. S., 340.

VOL. 13.

(b) 11 M. & W. 534.

(d) 9 Bar. & Cres. 259.

(f) 5 Ex. Rep., N. S., 229.

21 L.

H. T. 1862.  
*Common Pleas.*  
 COVENTRY  
 v.  
 M'ENIRY.

of the contract would not have enabled the defendant to have given in evidence the facts stated in these defences: *Boake v. M'Cracken* (a). The leading case is *Poulton v. Lattimore*. The cases are admirably collected in the note to *Cutter v. Powell*, in *Smith's Leading Cases*, vol. 2, p. 22. Our argument is, that the property never passed, as the goods delivered were not the goods purchased: *Lucy v. Mouflet* (b); *Tye v. Fynmore* (c). The result of the cases is stated in the last edition of *Chitty on Contracts*, p. 398. They also cited *Browne v. Davis* (d); *Okell v. Smith* (e); *Street v. Blay* (f); *Jones v. Bright* (g).

*Sullivan*, in reply.

No doubt, where an action is brought against a vendee, he is at liberty to show that the goods, the subject matter of the action, were bought under a warranty which has been broken. But he ought also to show that the goods were not of any value to him. It is consistent with the defences here that the defendant converted into useless material a greater quantity of this corn than was necessary for the purpose of testing its quality. If he did so, his defence would be clearly insufficient. It has been so laid down by Bramwell, B., in the case of *Lucy v. Mouflet*. The only value of the case of *Poulton v. Lattimore*, which has been relied on by the other side, is to show that the fact of the breach may be given in evidence in mitigation of damages.

*Cur. ad. vult.*

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MONAHAN, C. J.

Jan. 25.

This case comes before us on demurrer to two of the defences or pleas. The summons and plaint is in the common form used in an action for goods sold and delivered by the plaintiff to the defendant, at his request. The defences are as follows.—[His Lordship stated

(a) 6 Ir. Com. Law Rep. 248.

(b) 29 Law Jour., Exch., N. S., 110; S. C., 5 Exch. Rep., N. S., 229.

(c) 3 Camp. 462.

(d) 7 East. 479.

(e) 1 Str. 107.

(f) 2 B. & Ad. 463.

(g) 5 Bing. 585.

both defences.]—To both of these defences the plaintiff has demurred. The case has been fully argued before us; it was contended on the part of the defendant, as a general proposition, that when goods are sold subject to a warranty, they may be returned to the seller, in case they shall be found not to answer the terms of the warranty; and accordingly, that the defendant having offered to return these goods, he is entitled to rely thereon as a defence to the action.

H. T. 1862.  
*Common Pleas.*  
**COVENTRY**  
*v.*  
**M'ENIRY.**

The law on this subject is clearly settled, and it is this:—if goods be sold on a warranty of being equal to sample, or fit for any purpose, as, for example, for malting, and the sale be not of some specific article, as a particular hogshead of sugar or a horse, but of something out of a larger bulk, the purchaser may take any one of three courses: he may examine the goods to ascertain whether they correspond with the sample or warranty, and if they do not, he may rescind the contract and return the goods. But if he seek to rescind the contract all, it must be a total rescinding. Therefore two things are essential; first to make the examination within a reasonable time; and secondly, if the examination involve the destruction of a portion of the article, as for instance its conversion into malt, he must only use so much as is necessary for the trial, and he must return, within a reasonable time, the residue of the article itself, together with the small portion so converted. The second course which he may adopt is, not to rescind the contract, but to retain the goods, and pay for them what they are reasonably worth, having regard to the contract price and the inferiority of the article delivered. The third course is this:—the purchaser may pay the full price in the first instance, but may afterwards bring an action against the seller for the breach of warranty, and recover from him the amount of the damage occasioned thereby. The present defences are framed upon the supposition that the defendant was entitled to rescind the contract, because it does not contain any offer to pay for the goods, or allege that they were of no value.

The facts stated in the defences amount to this;—that after the barley was delivered to the defendant, he converted a portion of it,



H. T. 1862.  
*Common Pleas.*

COVENTRY  
v.

M'ENIRY.

into malt (he does not say what portion), and after having done so, he claims to be entitled to rescind the contract on the ground of the barley being unfit for malting. We think that in order to sustain the pleas upon the ground, either that the barley was unfit for malting, or was not equal to the sample, the defences should state, first, that the defendant used no more than was necessary for the purpose of trial; secondly, they should have averred the making of an offer to return the barley within a reasonable time; and for want of these averments, we are of opinion that the defences are clearly demurrable. *Poulton v. Lattimore* (a) is the case which has been mainly relied on in support of the present defences; but when the principle of that case is rightly considered, we are of opinion it has no bearing on the present case. There, the plaintiff had sold some seed to the defendant, warranted to be "good new growing seed;" it appeared that shortly after the defendant got the seed he had a skilful man to examine it, who came to the conclusion that it was not good seed. The defendant, however, did not think it right to act on this information, and did not offer to return the seed; but he sowed a portion of it for his own use, and sold the residue to two persons for the purpose of sowing it. An action was afterwards brought against the purchaser, and under the plea of the general issue, he gave evidence to show that the seed had produced nothing at all; and that, so far from its having been an article of any value, it was actually prejudicial to him, for it kept the land idle without any return; and that, as to the portion sold to third persons, that they had refused to pay the defendant, upon the same grounds as he refused to pay the plaintiff; and therefore that, on the whole, the defendant had derived no value whatever for the seed, and that it was perfectly valueless. The Court accordingly held that the plaintiff was not entitled to recover. There can be no doubt that if that had been a case in which the Court had decided that the defendant was entitled to return the goods, and so to rescind the contract, that would be an authority in favor of the defendant in the present action; but such was not the ground upon which the Court proceeded. What we take to have been the ground of that decision was, not the

(a) 9 B. & C. 259.

rescinding of the contract, but that the goods, which had been accepted on the faith of a warranty, turned out to be of *no value whatever*. The Court held that to be a good defence to the action, just as in a case where an attorney brings an action for work and labour, it is open to the defendant to show that the work was of no value whatever, and therefore that he is not liable to pay. Therefore we think that that case has no application to the one before us; for there is no allegation here that the malt was of no value; and therefore, on his own showing, the plaintiff must pay the price of the barley which was not converted into malt, and also of the malt which he manufactured, if it be of any value; and the defendant does not allege that such was not the case. The recent case of *Lucy v. Mouflet (a)* has a strong bearing upon the present. That was an action for goods sold and delivered; and it came before the Court of Exchequer upon an appeal from a County Court. At the trial it appeared that the plaintiff was a cider merchant, and had sold to the defendant a lot of what was expressly warranted to be good draft cider. The County Court Judge decided that, inasmuch as the merchant was bound to deliver it to the purchaser, the question was, whether it was of good quality at the time of its delivery in London, and not what it was in Hereford. It arrived in London the first week in May, whereupon the defendant put the hogshead into his cellar, and commenced to sell a small portion to his customers. He afterwards wrote to the plaintiff, saying that he had tapped "the hogshead, and found it quite a different article from the sample you showed me," offering to return it. There was no delay on the part of the defendant in giving this information; and assuming that an interval had elapsed, there is no doubt that it was no longer than would fairly allow the cider to settle after the journey. There was therefore no default on his part. The plaintiff took no notice of this letter; and on the 21st of June the defendant again wrote to him, referring to his former letter; still no answer was returned; and the result was that the cider was sent back to Hereford. The County Court Judge doubted whether the fact of the defendant having kept the cider from May to July rendered him

H. T. 1862.  
*Common Pleas.*  
 COVENTRY  
 v.  
 M'ENIRY.

(a) 5 Ex., N. S., 229.

H. T. 1862.  
*Common Pleas.*

COVENTRY  
v.  
M'ENIRY.

liable, as having kept it too long, being of opinion that keeping goods too long amounts to an acceptance, not only of a portion, but of the entire. But he was also of opinion that the question really involved in the case was, whether the writing of the letters by the defendant, and the absence of any reply from the plaintiff, amounted to an acquiescence by the plaintiff, in the defendant retaining the cider for further sale. The Court were of opinion that, but for the letter of the 28th, and the silence of the plaintiff giving consent, they must have held that the delay was too great, and that the defendant would have been liable to pay the full price; but under the circumstances, they held that, owing to the absence of a letter in reply to the defendant's letter, the plaintiff must be regarded as having acquiesced, and that he was accordingly entitled to recover only the amount brought into Court by the defendant, being the full value of the portion of the cider actually consumed by the defendant and his customers. That case therefore goes in support of this demurrer; and therefore upon the authority of this, as well as the other cases referred to on the part of the plaintiff, we have no hesitation in holding that these defences, which proceed upon the ground of the rescinding of the contract, are bad, for not showing the use only of a reasonable quantity of the barley, and the offer to return the residue of the barley and the malt within a reasonable time.

Judgment for plaintiff.

H. T. 1862.

Jan. 30.

E. T. 1862.

April 29.

HOGAN v. BYRNE.

A devise of a "house, garden, out-office, lawn, to monks named 'Christian Brothers,' " is void for uncertainty. THIS was an ejectment on the title, brought for the recovery of a dwelling-house and a small portion of land, in the parish of Rath-

downey, in the Queen's County. The action was tried at the Maryborough Summer Assizes 1861, before Lefroy, C. J. The plaintiff gave in evidence a lease, dated the 10th of January 1850, whereby the premises in question were demised to the Rev. Martin Cody, and his heirs, for lives ; also probate of his will, dated the 27th of July 1855, which will contained a devise in the terms following, viz—"I will my house and garden, out-office, lawn, to monks named 'Christian Brothers,' and £100, in order to pay their rent." He appointed the Rev. Patrick Byrne, P.P., and Mr. Rody Church, of Rathdowney, his executors, who, after the death of the testator, entered into possession of the premises. The plaintiff gave evidence to show that Mrs. Hogan, the wife of the plaintiff Richard Hogan, was the heiress-at-law of the deceased. At the close of the plaintiff's case, the defendant's Counsel called as a witness Mr. Daniel Joseph Manning, who deposed that he was a Christian Brother, and resided in Kilkenny. He gave evidence as to the nature of the religious order to which he belonged, which he stated to be devoted exclusively to the gratuitous education of the poor. Popularly they are known as monks ; but their proper designation is "Christian Brothers." They take the vows after their admission ; but they are not in holy orders. The order has been established in Ireland about sixty years. Michael Paul Reardon is the head of the society. He resides in Dublin. When a vacancy in the office of superior occurs, it is filled up by the suffrages of the members. There are thirty-five houses belonging to the order in Ireland, and seven in England, all of which constitute one society, though divided into several branches, under one head, who resides in Dublin, Mr. O'Reardon. There are no branches existing elsewhere than in Ireland and England. The witness on cross-examination stated that this body came within the class in the church denominated "Monks ;" that none of the members are in holy orders ; that they do not possess property individually, not except for educational purposes ; that any property devised to them is held for the benefit of the body and their successors ; and that property left in the town where the testator lived is to be considered to have been intended for the benefit of the society. Mr. Austin Horan, another of the Christian Bro-

H. T. 1861.  
*Common Pleas.*

HOGAN  
v.  
BYRNE.

H. T. 1862.

*Common Pleas.*

HOGAN

v.

BYRNE.

there was also examined, and stated that the members of the body were under the vows of poverty, chastity and obedience, which vows are perpetual; that they were not ordained priests, but were a monastic order, in the general acceptance of the term, and came within the class known in the Roman Catholic Church as "Monks." They were established in Ireland in 1801, exclusively for the gratuitous education of the poor. Of the three Brothers originally located in Maryborough, one was still resident in 1855, and another lived in Kilkenny. The head of the order receives the candidate for admission on trial, and then permanently. About half of the present members of the body were such previous to 1855. The superior would represent the body, and take any property left to them, but would apply same exclusively to educational purposes.

The defendant's case having closed, the LORD CHIEF JUSTICE directed a verdict for the plaintiffs, as representing the heir-at-law of the testator; subject to be turned into a verdict for defendant, in case the Court should be of opinion that the devise in the will was valid.

*J. T. Ball* (with whom was *J. E. Walsh*) now showed cause on behalf of the plaintiff. The character to be filled by the devisee in this case must be both Monks and Christian Brothers; and the devise is consequently void, in consequence of the prohibition against monastic orders in the Roman Catholic Relief Act (10 G. 4, c. 7, ss. 28, 29, 30, 31. Independently of this, if the devise be taken as a gift to individuals, it is void for uncertainty. It is not to be supposed that the testator intended that all the members of the order living in England and Ireland at the time of the death of the testator were to take, and there is nothing to support the devise to the monks living in any particular locality. Suppose the devise to be construed as one to them as a corporation, it is against the policy of the law, and is void: 2 *Inst.*, pp. 70, 74; *Evans v. Cassidy* (a); *Blake v. Blake* (b); *Carbery v. Cox* (c); *O'Leary on Charit. Uses*, p. 136; *De Garcier v. Lawson* (d).

(a) 11 Ir. Eq. Rep.

(b) 4 Ir. Com. Law Rep. 349.

(c) 3 Ir. Chan. Rep. 231.

(d) 4 Ves. 433, n.

*Macdonogh and Palles*, contra.

There is nothing in the finding of the jury in this case from which the Court can infer that the devise was made to an illegal body. The Act of the 9 *W. 3*, c. 1, referred exclusively to *regular clergy*. The 2 *Anne*, c. 3, extended that to *secular* as well as regular *clergy*, and was for fourteen years only. The Registration Act of the same session (2 *Anne*, c. 7) applied to Popish priests then in the Kingdom. The 4 *Anne*, c. 2, extended to Popish priests not registered, and was to continue for three years only; and the Act of the 8 *Anne*, c. 3, s. 17, only perpetuated the 2 *Anne*, c. 3, and 4 *Anne*, c. 2, which were limited to secular clergy. The Act 13 & 14 *G. 3*, c. 5, was an enabling statute, and created no new disability; and the greatest effect of the proviso in 21 & 22 *G. 3*, c. 24, is to exclude regular clergy from the benefit of the Act. The Emancipation Act (10 *G. 4*, c. 7, s. 28) extends to all religious orders, communities or societies, bound by monastic or religious vows; but facts are not found by the jury to enable the Court to say this order is within that description; or, if it is, that its members are not registered under the Act. Illegality cannot be presumed. The Christian Brothers being laymen are not within any of these Acts. If that body be not illegal, the devise is good, unless void upon the ground of uncertainty. The presumption should be in favor of the bequest: *Best on Evidence*, p. 447, edition of 1860: *Carbery v. Cox* (a). If it should be held that these persons cannot take as a body, they can take as individuals.—[CHRISTIAN, J. If you do that, you disappoint the testator's intention. He intended that the land should be held by one body, and not that it should be divided into an indefinite number of parts, each to belong to a different person].—In construing this will, the Court should consider the property intended to pass, and the estate for which it was given, and should, if possible, prevent a failure of the devise: *Tellusson v. Rendlesham* (b).

They also referred to *Blake v. Blake* (c); *Regina v. Lady Portington* (d); *Read v. Hodgins* (e).

(a) 2 H. & Br. 301.

(b) 7 H. L. Cas. 429.

(c) 4 Ir. Com. Law Rep. 355.

(d) 1 Salk. 162.

(e) 7 Ir. Eq. Rep. 34.

H. T. 1862.  
*Common Pleas.*

HOGAN  
v.  
BYRNE.

H. T. 1862. *J. E. Walsh*, in reply, cited *Co. Lit.* 3 *a*, note c. and d.; *Lockwood v. Wood* (a); *Com. Dig.*, tit. *Capacity*, B (1); *Year Book*, 10 *Hen.* 4, f. 8, pl. 3; *Fowler v. Dale* (b); *Vin. Ab.*, tit. *Corporation*, E, pl. 8; *Ellis v. Selby* (c); *Thomson v. Shakspeare* (d); *Strode v. Lady Falkland* (e); *Doe d. Smith v. Henry* (f); *Corporation of Gloucester v. Osborne* (g); 9 *W.* 3, c. 7; 2 *Anne*, c. 7; 4 *Anne*, c. 2; 8 *Anne*, c. 3; 21 & 22 *G.* 3, c. 24.

*Cur. ad. vult.*

E. T. 1862. **MONAHAN, C. J.**  
*April 29.* This case comes before the Court upon a motion to show cause against a rule obtained by defendant to change the verdict which had been found for the plaintiff into one for the defendant. It was an ejectment on the title, tried before the Lord Chief Justice, at the last Queen's County Assizes. The defendant is the Rev. Patrick Byrne, parish priest of Rathdowney. The ejectment was brought to recover possession of a house and garden, containing about an acre and a quarter, in Rathdowney. The plaintiff's title is alleged to have accrued on the 15th of June 1860; and it was proved that the wife of the plaintiff Richard Hogan, who is joined with him in the action, was the heiress-at-law of the late Rev. Martin Cody, who held the premises in question under a lease for lives made to him and his heirs. The defendant is the executor named in the will of the Rev. Mr. Cody, a copy of which the plaintiffs gave in evidence; and the portion of it material to the present case runs in these words.—[His Lordship read the clause.]—The question at the trial was, whether the devise in the will of the testator's house and garden at Rathdowney to "the monks named 'Christian Brothers,'" was a legal devise, so as to pass the land, and thereby take the title and right of possession out of the heir-at-law. Of course it became necessary for the defendant to show that the devise to the monks

(a) 6 Q. B. 62-63.

(b) Cro. Eliz. 362.

(c) 7 Sim. 352.

(d) 1 De G. & J. 399.

(e) 3 Chan. Rep. 183; S. C., 2 Vern. 624. (f) 2 Cr. M. & Ros. 638.

(g) 3 Hare, 131; S. C., 1 H. of L. Cas. 272.

named "Christian Brothers" had some legal operation; and to establish that part, he went into evidence to show the constitution and objects of the order; and he called as witnesses Messrs. Daniel Joseph Manning and Austin Horan, who deposed as follows.—[His Lordship stated their evidence as it appeared in the report of the Lord Chief Justice].—The question therefore is this, what is the construction of this devise, considered with reference to the constitution of this body? It was conceded during the argument that, if this devise had been one to a body of monks, as a religious order, it could have no legal operation. It is plain that, in order to vest property from time to time in the varying members of an order, so as to pass from the existing to the future members, it should have a corporate capacity; and accordingly it cannot, for one moment, be contended that, if the true construction of this devise be one to the monks as an order, that it can have any legal operation. We were referred to a few authorities during the argument, to which I need not particularly allude. I may just mention *Co. Lit.*, 3, a:—"The parishioners or inhabitants or *probi homines* of Dale, or the churchwardens, are not capable to purchase lands." In the case of *Lockwood v. Wood* (a), Tindal, J., referring to the exception, which follows this passage, "unless it were in ancient time, when such grants were allowed," says that, "that exception would probably be found to be confined to grants by the Crown, and to stand upon the reason stated in *Dyer's Reports*, p. 100, a; that if the Queen grants lands by her charter to her good men of the town of Islington, without saying 'to them and their successors rendering a rent,' it is a good corporation, perpetual to that extent only, and no other, because that a rent is reserved."

Therefore if, in this case, it were the intention of the testator that these lands should vest in them, as a body corporate, the devise must fail. In order to avoid this result, the defendant's Counsel argued that this devise might be supported by construing it as a gift to the individual members of the order, for their personal benefit, and not to the members of the society in their collective capacity. But before we can arrive at that conclusion, it is neces-

E. T. 1862.  
*Common Pleas.*

HOGAN  
v.  
BYRNE.

(a) 2 Q. B. 62-3.



E. T. 1862.  
*Common Pleas,*  
 HOGAN  
 v.  
 BYRNE.

sary to ascertain who those individuals are. It appeared in evidence at the trial, that there were in existence no less than forty-two of these establishments, thirty-five in Ireland and seven in England, with the average number of three to seven members in each. There is, on the face of the will, no particular reference to any individual members of the society; and seeing that there are about forty of these establishments in Ireland and England, about thirty-five being in Ireland, with from three to seven members in each—if we were to hold that this was a devise to the individual monks in their individual capacity, we must either hold it void for uncertainty, there being nothing to distinguish, by residence or otherwise, any one establishment of these monks from any other; or we must hold that it was a devise to all the monks of the several establishments and their heirs as joint tenants—in other words, that this house and garden should vest in some two hundred persons for their individual benefit. This we think so inconsistent with the nature of the property and the situation and circumstances of the members of this order, that we think we would be acting altogether contrary to the intention of the testator if we were so to hold. We entertain no doubt that what the testator intended was, that the property should vest in the order as such, bound by the rules of the order, as stated in the evidence; and that it never was the intention of the testator that any individual of the order should have any personal benefit therefrom: and such, in our opinion, having been the intention of the testator, we consider we are bound to hold such to be the construction of his will; and therefore, that same is void, the order as such not being capable to take lands by purchase. We have been referred to some cases in the Court of Chancery, in which, from the report, it would appear that devises and bequests to monks were upheld: of these cases it is sufficient to say, it became in these cases unnecessary to decide whether the devises passed a legal estate. The Court was of opinion that a charitable trust was created, and therefore it was a matter of no consequence whether the legal estate was in the devisee or heir-at-law, as in either case the estate was held bound by the trust; and though in some of those cases expressions may be found, from which it might be

inferred that the opinion of the Court was, that legal estates passed to individuals, we cannot consider these cases as authorities to bind us in a case like the present, where we have nothing to do with any charitable trust that may have been created. If any such is supposed to exist in the present case, the Court of Chancery is the only Court to deal with it. We merely decide that no legal estate passed by the will, and therefore, that the verdict had for the plaintiffs, one of whom is the heir-at-law of the testator must stand.

E. T. 1862.  
*Common Pleas.*

HOGAN  
v.  
BYRNE.

MONTGOMERY v. MIDDLETON & POLLEXFEN.

E. T. 1862.  
April 26, 28,  
29.

T. T. 1862.  
June 11, 12,  
30.

THIS was an action for not accepting a cargo of corn, purchased by defendants from the plaintiff, by agreement of the 23rd of May 1861. At the time of the contract the cargo was on board a vessel called "The Surf," then on her passage, and bound for Sligo, under charter-party dated 20th of April 1861.

There were several counts in the summons and plaint. Defendants, among other defences, pleaded that it was a term of the agreement that, should the vessel not arrive on or before the 20th of June, the contract should be void; and that the vessel did not in fact arrive on or before the 20th of June, and that therefore the defendants refused to accept the cargo.

A cargo of Indian corn was shipped at New York, on a vessel named "The Surf," bound for Sligo. A written contract was made between the plaintiff and the defendants, for the sale and purchase of the cargo; and one of the terms was that, if the "Surf" did not "arrive" on or

before the 20th of June, the contract should be void. The "Surf" arrived prior to the 20th of June, at a place called "Oyster Island," about four miles from Sligo, and within the natural port and harbour of Sligo. It appeared that vessels anchoring at Oyster Island report themselves to the custom-house of Sligo, and become liable to port and harbour dues. The "Surf" did not arrive at the quay of Sligo until after the 20th. The defendant having at the trial relied upon the breach of condition, the LORD CHIEF JUSTICE ruled that the term "arrive," in the condition meant "at the quay of Sligo;" and he accordingly directed a verdict for the defendants. The facts having been stated in special case for the opinion of the Court—*Held* (per KNOX and CHRISTIAN, JJ., MONAHAN, C. J., *dissentiente*), that the question of arrival was one of fact, and should have gone to the jury.

*Held*, per MONAHAN, C. J., that the question entirely turned upon the meaning of the word "arrive" in the contract, and was one of law, to be determined by the Court.

E. T. 1862.

*Common Pleas.*

MONTGOMERY

v.

MIDDLETON.

The only question in controversy at the trial was, whether in fact the vessel had arrived on or before the 20th of June as required by the contract?

The case came on for trial at the Sittings after Michaelmas Term 1861, before the LORD CHIEF JUSTICE; and his Lordship directed a verdict for the defendants; and by consent of the parties the facts following were to be taken as if found by the jury, and to form a special case. The facts are as follows:—The port and harbour of Sligo are regulated by the statute of 9 Vic., c. 24, and the Consolidated Acts; and by said Acts the said port and harbour extend from the bridge of Sligo to the “Wheaten Rock,” a place in the ocean, and about ten miles from Sligo; and the Admiralty map, which was proved at the trial, is referred to in, and incorporated with, the special case, as a description of the localities; but the soundings of the map are not accurate, the harbour having been improved within the last six or eight years. The defendants are merchants in Sligo, and at the time of the contract of 23rd of May 1861, knew the channel and tides and usages of the port of Sligo. The port of Sligo is a tidal port, at which, owing to the shallowness of the river, vessels drawing more than fourteen feet of water cannot come up to the quays, and vessels drawing twelve feet of water or more cannot get up to the quays, except on very favorable neap tides, or at spring tides, which occur at intervals; and which spring tides last three or four days, an interval of six or seven days occurring between the end of one spring tide and the commencement of another. Within the municipal and parliamentary boundaries of the borough of Sligo there are three quays for the discharge of cargoes of vessels. The quays are suited to vessels drawing different draughts of water, and the most important of said quays is the most seaward, and is called “The Ballast-quay:” and the map of such municipal and parliamentary districts is referred to and incorporated in this special case. There is an island called “Oyster Island,” distant from the quays of Sligo about four miles; and the said Oyster Island is within the natural port and harbour of Sligo. Ballyshannon, a town in the county of Donegal, and about twenty miles from Sligo, is, for custom-house

purposes, within the port of Sligo. By the usage and custom of the port of Sligo, vessels bound for Sligo of such a draught as permits their going up to the wharfs, either go up to the quays at once, if wind and tide permit, or they drop anchor at Oyster Island, and report themselves at the custom-house, and they are then liable to custom-house and port dues. If vessels are of a draught of water too deep to enable them to go up even with the spring tides, they discharge part of their cargo at Oyster Island, or at a place called The Pool, where the holding ground is better than at Oyster Island, and about half a mile nearer the quay; and such partial discharge in both cases is into lighters, at the expense of the consignee. Such vessels when sufficiently lightened, that is to say, lightened to a draught of about twelve feet of water, go up to the quay side; but if they cannot be sufficiently lightened to get up to the quay, they discharge their entire cargo at Oyster Island, or The Pool, into lighters, at the expense of the consignee. As to vessels about twelve feet or thirteen feet draught of water, if they drop anchor at Oyster Island, they then report themselves, and are bound by the first spring tide to go up to the quay side, and there discharge cargo; and the lay days commence to run and count after such arrival at the quays, and when the ships are ready for discharging cargo there. Whenever vessels are under charter to discharge afloat, they discharge cargo either at Oyster Island or at the Pool, irrespectively of draught or tonnage; and at both places, to wit, Oyster Island and The Pool, it is into lighters that the cargo is discharged, at the expense of the consignee. At Oyster Island there was and is no quay for discharging cargoes; but there is an anchorage between the mainland and Oyster Island; but the holding ground not being good, there are mooring posts on the mainland on one side, and on the island on the other side, to moor vessels to, and to keep them safe at anchor; and which vessels when so moored ride in the sound or stream between the mainland and the island. In the case of vessels of too deep a draught to go up to the quays with full cargo, the lay days are counted during the process of

E. T. 1862.  
*Common Pleas.*  
MONTGOMERY  
v.  
MIDDLETON.

E. T. 1862.  
*Common Pleas.*  
 MONTGOMERY  
 v.  
 MIDDLETON.

being discharged, or from the time they are ready to be discharged at Oyster Island or The Pool; and then they cease to be counted until the vessels proceed to the quays, and are again ready to recommence discharge of cargo. A certain reef of rocks, called "The Blennicks," exists between Oyster Island and the quay, which reef, in certain states of the wind and weather, is a source of danger to vessels going up to the quays from Oyster Island; and the witnesses mentioned some three or four instances of vessels having been injured thereon.

The contract of the 23rd of May, upon which the action was brought, was entered into in duplicate, and proved at the trial, which is as follows:—

"Sligo, May 23, 1861."

"Purchased from James Pim & Co., Dublin, agents for Montgomery Brothers, New York, the cargo of mixed maize, shipped per 'Surf,' from New York, consisting of say 9906 bushels, in bags, as 'per bill of lading, dated April 23rd 1861, at the price of 35s. 6d., 'say thirty-five shillings and sixpence per quarter of 480 lbs., delivered cost, freight and insurance, now on passage to Sligo direct."

"Condition guaranteed on discharge; slight heat, not injuring the grain, not to be objected to; any damaged, to seller's account."

"Buyers to pay duty and dues at Sligo."

"Payment in exchange for documents, on arrival of the vessel at Sligo, in cash, less two months' interest at £5 per cent. per annum; or in buyers' option, by their acceptance, at two months' date; any balance to be paid or received when quantity is ascertained."

"Should the vessel not arrive on or before the 20th of June next, this contract to be void. In case of any dispute, this contract not to be void; it being agreed by buyers and sellers to leave the same to two London corn factors, mutually chosen, or their umpire, and to be bound by their decision."

"Bags, say thirty-three hundred and sixty-five, to be reserved for seller's account."

"All risk of underwriters for seller's account."

"MIDDLETON & POLLEXFEN."

Several letters were also incorporated by reference with the case ; E. T. 1862.  
but it is not necessary to refer to them in detail. *Common Pleas.*

The case further stated that, by the contract between the parties, *MONTGOMERY*  
having regard to the usage of the port, the "Surf" was obliged to *v.*  
discharge her cargo at the quay ; and the defendants were not bound *MIDDLETON.*  
to take delivery elsewhere.

The "Surf" arrived at Oyster Island on the 12th of June ; and the captain having anchored and moored there in the usual place, proceeded to the town of Sligo on that day, and employed the defendants as ship's agents. The defendants did not inform the captain that the defendants were the consignees of the cargo, nor that the captain was under any obligation as to the time of the arrival of the ship. The report, bearing date the 12th day of June 1861, is in the handwriting of a clerk of defendants, and signed by the captain, and was on that day delivered at the custom-house, and which report was incorporated with the case. The "Surf" is a vessel of about 270 tons burden, and when loaded draws about twelve feet of water. The tide was favorable to allow the vessel to go up to the quay side on the day of her arrival at Oyster Island ; and on the following day (the 13th of June), and on the 14th also, there was a possibility of her going up with a tug-steamer's assistance ; but that as the wind was blowing down the river, she could not go up without the assistance of a tug-steamer on any of those days, and if she had had the assistance of a tug on the 12th and 13th of June, and possibly on the 14th of June, she could have proceeded up to the quay side. The defendants on the 12th of June offered a tug to the captain, but the captain declined to avail himself of the assistance of said tug, on the ground of expense. Owing to the circumstance of the "cutting off" of the spring tides, the "Surf" was unable to go up to the quay side on any subsequent day after the 14th, before the 21st of June ; and she went up, with the assistance of a tug-steamer, to the quay side, on the 21st of June 1861 ; and the said defendants thereupon repudiated the said cargo, and declared the contract void, and refused to accept the cargo, though required so

E. T. 1862.  
*Common Pleas.*  
MONTGOMERY  
v.  
MIDDLETON.

to do, inasmuch as the "Surf" had not arrived on or before the 20th of June; and thereupon, after such refusal of the defendants, Mr. Harper Campbell, a merchant in Sligo, by the authority of the agents of the plaintiff, entered the cargo of the vessel at the custom-house on the 27th of June, and then commenced to discharge same on said quay, and sold same for a sum considerably less than the sum which the defendants agreed to pay for same; and the loss sustained by the plaintiff amounted to £472. 11s. 5d. No case previous to the present has arisen, in which a vessel bound for Sligo, obliged to arrive before a given day, had arrived at Oyster Island within the specified time, but had not arrived at the quay until after.

At the close of the case on both sides, the LORD CHIEF JUSTICE informed the jury that, as the "Surf" was obliged to deliver her cargo at the quay, in his opinion she was obliged to be at or alongside the quay on or before the 20th of June, and that the fact of her having arrived at Oyster Island before the 20th of June was not sufficient, though it appeared that where she so arrived was within the natural port and harbour of Sligo; and therefore he directed the jury to find that the vessel had not arrived on or before the 20th of June; to which direction of the LORD CHIEF JUSTICE Counsel for the plaintiff objected, and required him to direct the jury that, as the "Surf" had arrived at Oyster Island, which is within the port and harbour of Sligo, before the 20th of June, that such was an arrival within the terms of the contract between the parties; which the LORD CHIEF JUSTICE refused to do, but, by consent of the parties, reserved liberty for the plaintiff to move to have a verdict entered for him for the sum of £472. 11s. 5d., being the damage sustained by the plaintiff, if he should have so directed; and plaintiff's Counsel further objected to the direction so given by the LORD CHIEF JUSTICE, and required him to leave to the jury, as a question of fact, whether the vessel had arrived on or before the 20th of June, within the true intent and meaning of the contract between the parties; which the LORD CHIEF JUSTICE refused to do, but by consent of the parties reserved liberty for the plaintiff to move for a new trial, if he should have done so; whereupon the jury found a

verdict for the defendants, under the direction of the LORD CHIEF JUSTICE. E. T. 1862.  
*Common Pleas*

On the 15th of January last a conditional order was obtained, on the part of the plaintiff, to set aside the verdict and to change same into a verdict for the plaintiff, or for a new trial, on the ground of misdirection, and that the LORD CHIEF JUSTICE had not ruled according to law at the trial, in refusing to leave to the jury as a question of fact, whether the vessel had arrived on or before the 20th of June 1861, within the true intent and meaning of the contract.

Cause was shown on behalf of defendants against making absolute said conditional order, by— April 26, 28,  
29.  
June, 11, 12.

*Macdonogh and Purcell.*

Serjeant *Armstrong* and *D. C. Heron* (with whom was *W. J. Corrigan*), appeared on behalf of the plaintiff in support of the conditional order.

The following authorities were cited during the argument :  
*Shadforth v. Higgins* (a); *Glaholm v. Hayes* (b); *Crookewit v. Fletcher* (c); *Parker v. Winlow* (d); *Brown v. Johnson* (e); *Brereton v. Chapman* (f); *Whitwell v. Harrison* (g); *Soames v. Lonergan* (h); *Lang v. Anderson* (i); *Graham v. Barrett* (k); *Moir v. Royal Exchange Insurance Company* (l); *Lindsay v. Janson* (m); *Jarman v. Coape* (n); *Dagleish v. Brooke* (o); *Smith Thompson* (p); *Williams v. Marshall* (q); *Mellish v. Staniforth* (r); *Reyner v. Pearson* (s); *Thompson v. Gillespie* (t); *Wells v. Hop-*

(a) 3 Camp. 385.

(b) 2 M. & Gr. 267.

(c) 1 H. & N. 893.

(d) 7 El. & Bl. 948.

(e) 10 M. & W. 331.

(f) 7 Bing. 549.

(g) 2 Ex. R. 135.

(h) 2 B. & C. 564.

(i) 3 B. & C. 498.

(k) 5 B. & Ad. 411.

(l) 4 Camp. 85; S. C., 6 Taunt. 241.

(m) 4 H. & N. 699.

(n) 2 Camp. 613; S. C., 13 East. 394.

(o) 15 East. 295.

(p) 8 C. B. 44.

(q) 6 Taunt. 596.

(r) 3 Taunt. 499.

(s) 4 Taunt. 662.

(t) 5 El. & Bl. 209.



T. T. 1862. *wood* (a); *Hutcheson v. Bowker* (b); *Neilson v. Harford* (c);  
*Common Pleas* *Levin v. Newnham* (d); *Kell v. Anderson* (e); *Starkie on Evi-*  
 MONTGOMERY *dence*, pp. 56, 525; *Roscoe's Criminal Evidence*, p. 921.  
 v.  
 MIDDLETON.

*Cur. ad vult.*

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CHRISTIAN, J.

July 7.

The facts are so fully stated in the special case that it is not necessary to repeat them. They were not found by the jury, but by consent of the parties they are to be taken as if they had been so found. The CHIEF JUSTICE, at the trial, taking those facts to be conceded (as they were), treated the case as being one for a direction, and he directed a verdict for the defendants. The plaintiff's Counsel objected, first, that if there was to be a direction, it ought to be a direction in their favor; but, secondly, having failed in that, they insisted that it was not a case for a direction at all, but was one of fact, to be left to the jury.

It is obvious that the latter contention ought to have preceded the former, because if it were well founded, the former question could not arise. And that is, in my opinion, the true state of the case.

The point to which the case resolved itself was, whether a certain condition in defeasance of this contract, which was one for the purchase of a cargo of corn, then at sea on its transit from New York to Sligo, had been performed by the vendors? That condition was in these terms, "Should the vessel not arrive on or before the 20th of June next, this contract to be void." In fact the vessel arrived on the 12th of June at Oyster Island, which is four miles from the quays of Sligo, but is within the natural port and harbour of Sligo, where there is an ordinary place of anchorage for vessels of all classes bound for Sligo, with mooring posts provided to keep them in safety, and on arrival at which all vessels report themselves at the custom-house, and become liable to customs and port dues; and where vessels of a certain

(a) 3 B. & Ad. 20.

(b) 5 M. & W. 535.

(c) 8 M. & W. 823.

(d) 4 Taunt. 722.

(e) 10 M. & W. 498.

draught of water commence discharging their cargoes into lighters, at the expense of the consignees. But by the usage of the port, a vessel of the draught of water of the "Surf," the vessel then in question, is obliged to discharge her cargo at the quay, and the consignee is not bound to take delivery elsewhere, and the lay days do not commence to run until after her arrival at the quay. For reasons mentioned in the case, and to which I refer without repeating them, the "Surf," though she anchored at Oyster Island on the 12th of June, and on the same day, through the instrumentality of the defendants themselves as ship's agents, duly reported herself at the custom-house, did not come along side the quay until the 21st. The defendants then refused the cargo, upon the ground that the condition was broken and the contract forfeited. They insisted, and they now insist, that there was no arrival within the meaning of this contract until the 21st. The plaintiff on the other hand insists, that the vessel "arrived" upon the 12th, and that the delay which followed was only material in the computation of lay days and demurrage, but could not work a forfeiture of the contract. The issue to be tried was, whether there had been an arrival on or before the 20th of June? The question I have now to consider is, to whom, assuming the facts which are stated in this case, did it appertain to answer that question, whether to the Judge or to the jury?

It is plain that the condition must be read as if the words "at Sligo" followed the word "arrive;" of its own force "arrive" imports some *terminus ad quem*, and the sentence is incomplete and unmeaning until we ascertain what that is. Well, the context at once supplies it. The sentence which precedes the condition clearly shows that the words "at Sligo" are those which the ellipsis supposes. This was admitted by the defendant's Counsel, and was assumed and argued upon at both sides. Well, *prima facie*, "arrive at Sligo," means the same thing as "arrive at the port of Sligo." So Byles, J., lays it down in *Lindsay v. Janson*. He says, "The words in the policy 'to the Mauritius' mean 'the same thing as the words 'to Port Louis in the Mauritius,' 'because if a vessel is bound to any country, it means bound to

T. T. 1862.  
Common Pleas  
MONTGOMERY  
v.  
MIDDLETON.

T. T. 1862.  
*Common Pleas*  
 MONTGOMERY  
 v.  
 MIDDLETON.

"some port there." Again, *prima facie*, the port of any place means its natural port and harbour; and therefore I apprehend that in a perfectly simple case, such for example as a wager that a vessel at sea would arrive at a particular place before a particular day, that would be held to mean, in the absence of special circumstances, arrive anywhere within the natural port and harbour of that place. But experience tells us that the nature of special contracts may be such as to render it impossible to adhere to this primary signification, whether the words be, arrive at the place, simply, or what is at least *prima facie* equivalent, arrive at the port of the place. In construing one contract it may be necessary to hold, in order to effectuate the intention, that within its meaning, the vessel has arrived, although she is far outside the natural port. In construing another contract it may be necessary to hold that she has not arrived, although she has got within the natural port. The cases in *East* and in *Taunton*, which were referred to in the argument, were cases of the first description; the present case, the defendants insist, is one of the second description. In both classes of cases it is obviously necessary (and is invariably done), to have recourse to parol evidence—evidence of local peculiarities, of tidal variations, of usage as to places of anchorage and discharge of cargo, and the like; and the facts stated in this special case are all of that character. Now what in my opinion is established by the cases which were cited—I refer particularly to *Reyner v. Pearson* (a); *Levin v. Newnham* (b); *Jarman v. Coape* (c); *Dagleish v. Brooke* (d); *Lindsay v. Janson* (e)—is this, that the question of arrival or departure, whichever it be, is essentially a question of fact; and that however out of all dispute, either upon proof or upon concession dispensing with it, may be the external circumstances, however clear it is (as of course it always is), that the construction of the contract belongs to the Court, and however palpable may be the conclusion resulting from the combination of those two, the circumstances (proved or admitted) and the contract, upon the

(a) 4 Taunt. 662.

(b) *Ibid*, 722.

(c) 13 East, 394.

(d) 15 East, 295.

(e) 4 H. & N. 699.

question at issue, namely, arrival or departure, yet as that question is in its nature one fact, it is one to which the jury, and the jury only, can respond.

T. T. 1862.  
Common Pleas  
MONTGOMERY  
v.  
MIDDLETON.

The cases in *East* and *Taunton* arose upon policies of marine insurance of a peculiar kind, much in use during the great war in the early part of the present century, when almost the whole seaboard of the continent of Europe was under the power or influence of France. In those policies the widest latitude was allowed to the assured in the selection of a port of discharge, the most sweeping indemnity was given against capture at sea, and all other sea risks: but the insurance companies insisted on being exempt from liability for land risk, i. e., from capture by a land force; and with a view to that, inserted in the policies the clause on which these cases arose, "free of capture or seizure in seaport or ports of discharge." In all of the cases, the vessel intending, if it could be safely done, to land the cargo in a certain port, was hovering in the approaches to it, waiting for intelligence, but far outside the natural harbour, when she was captured by a force from the land. The question in all was whether, within the meaning of the parties to the policy, that was a capture in her port of discharge? If it was, the Companies were not liable. In none of them was there any dispute as to the facts; or if there was, they were, as in this case, cleared up beyond dispute. It is true no special case was stated; no such practice existed then—but the facts were as much assumed as if there had been a special case. The question was, what on ascertained facts was the meaning of the parties? Was "port" to be taken in its proper natural sense, or in a larger and more liberal sense? Well, it was said there, as here, that the only thing in dispute was the construction of the contract, and that that was for the Judge. Accordingly in the first of them that we have reported, *Mellish v. Stanniforth* (a), Mansfield, C. J., was of opinion it was a question of law. As the report says—"The Chief Justice being at that time of opinion that it was a question of law, whether the vessel was in "port within the meaning of the warranty, the jury found a verdict

(a) 3 Taunt. 500.

T. T. 1862.  
*Common Pleas*  
**MONTGOMERY**  
*v.*  
**MIDDLETON.**

"for the plaintiff." But the subsequent cases, both in the Common Bench and the Queen's Bench, conclusively settled that it was a question of fact. In *Reynar v. Pearson*, the Chief Justice at the trial expressed his opinion to be, that on the facts the vessel was in her port of discharge, in which even they ought to find for the defendant; but he did not direct them to do so, he left the question to them, and they found against his opinion, and for the plaintiff. The Court refused to disturb the verdict, holding "that it was a question of all others peculiarly fit for the decision of the jury." *Levin v. Newnham* was to same effect. The same question came before the Queen's Bench about the same time in *Jarman v. Coape* and *Dagleish v. Brooke*. Upon reference to the reports of those cases it will be seen that the facts are spoken of as being quite out of dispute. The sole question was, whether within the meaning of the written contracts, as applied to those undisputed facts, the ascertained place where the capture took place, was within the ship's port of discharge? The Court held, in both cases, that this was a question for the jury exclusively. In the more modern case of *Lindsay v. Janson (a)*, the terms of the policy were "arrival at the Mauritius." If the loss which occurred was after "arrival at the Mauritius" (which, as shown by the Judge at the trial, meant the same thing as "at Port Louis in the Mauritius"), the plaintiff was entitled to succeed. Well, the facts were as clearly ascertained there as here. The ship arrived at the Bell Buoy, the locality and other circumstances of which were undisputed. Substitute for Port Louis in the Mauritius, Sligo in Ireland, and for the Bell Buoy, Oyster Island, and you have this very case (I mean of course as regards the question I am now considering, *i. e.*, whether the question of arrival is one of law or fact). Byles, J., who tried the case, took the same view as the LORD CHIEF JUSTICE did here. "He expressed his opinion that, taking the evidence to be true, the question whether this vessel had arrived was one of law." He was wrong in that, as the subsequent decision in the case shows. But he did not act on his opinion by directing a verdict, but left it to the jury to say "whether the Bell Buoy was part of the Mauritius."

(a) 4 H. & N. 699.

Great stress was laid in the argument here on the force of that question, as if it entirely distinguished that case. But it is quite obvious that the difference between that and the question "whether the vessel had arrived at the Mauritius," was merely one of words. The place of arrival being known, to ask, was that place part of the Mauritius, was obviously identical with asking had she arrived at the Mauritius. The real question there, as here, and as in the former cases, was, whether the known place the vessel was at, on a given day, was or was not the place meant by the contract? If the LORD CHIEF JUSTICE, at the trial of this case, after expressing his own opinion that the "Surf" had not arrived on or before the 20th of June, had left it to the jury to say whether Oyster Island was part of Sligo, within the meaning of the contract, the case would be (for the present purpose) identical with *Lindsay v. Janson*, and the plaintiffs would not I think have any valid ground of objection. Well, in *Lindsay v. Janson* the jury found in accordance with the Judge's opinion; and a new trial having been moved for, the Court of Exchequer were unanimously of opinion that the question was one of fact for the jury, and that they had answered it rightly. Pollock, C. B., says, "whether a vessel has arrived within a harbour, is purely a question of fact." Bramwell, B., says, "a question as to the identification of a place or person named is a question of fact." The latter learned Judge supposes a case which very well illustrates the matter.—"If," he says, "the plaintiff had demurred to a plea "setting out all the circumstances leading to the inference that the "vessel had arrived, no judgment could have been given whether "there was an arrival at the Mauritius or not, *because we could not know the fact.*" Why not? Because the inference which remained to be drawn *was* one of fact, and could therefore be drawn by a jury only. The case now before us differs from the one put by Mr. Baron Bramwell only in this, that instead of the circumstances being admitted by a demurrer to a plea stating them, they are admitted by a consent to a special case. But we cannot have, any more than the Court could there, "known the fact" of arrival or non-arrival; because the jury, who alone could draw the inference, were not allowed to do so.

T. T. 1862.  
*Common Pleas*  
 MONTGOMERY  
 v.  
 MIDDLETON.

T. T. 1862.  
*Common Pleas.*  
MONTGOMERY  
v.  
MIDDLETON.

Between those authorities and the present case I confess I am unable to discern any solid distinction. It was asserted by the defendant's Counsel that they are entirely different. Those, it was said, were quite plain cases, obviously mere questions of fact. Was the vessel when captured within a port of discharge? Had she, before she was lost, arrived at the Mauritius? Was the Bell Buoy part of the Mauritius? What are these but questions of fact? Well, so I say; although, as to its being so very clear that they were so, it is to be observed that, at the trial, in more than one of them, the Judge was of opinion that they were questions of law. But as yet, after having heard this case twice argued, I have heard nothing but bare assertions to show how it is that those questions were more or less questions of fact than is the question here—had the "Surf" arrived at Sligo? Was arrival at Oyster Island arrival at Sligo? Was Oyster Island part of Sligo, within the meaning of these parties? The result of the cases, as I understand them, is, that the question of arrival at a port or a place is purely a question of fact. Into that question there enters largely, in each particular case, the intent of the parties; but that intent is to be collected, not from a written document only (if so, it would be for the Court), but from a written document, combined with evidence of external circumstances; and it is a jury only to whom the law entrusts the duty of effecting that combination, and extracting the result. It is said that the facts here were all ascertained, and that all that remains is to construe the written document, and that that is for the Court. That is really begging the question. The facts are *not* ascertained. The grand fact—the ultimate fact—the one which is to be affirmed or negatived by the verdict, namely, did the vessel arrive? that is not ascertained. All the facts which are stated in the special case are no more than subordinate evidentiary facts, which conduce towards the proof of that which is itself but a fact. The Judge will instruct the jury upon the construction of the contract, if any question of mere construction arises on it; but it is for the jury to combine the contract thus construed with the external circumstances, and to extract the ultimate inference, was there an arrival, according to the true intent and meaning of

the parties? I asked, at the close of the argument, for authority bearing upon this question, namely, whether, in cases which present a mixed question of law and of fact, the Judge has a right, if either party object to it, to winnow the question, if I may so express it, separating the element of pure fact from those of pure law; sending the former only to the jury, reserving the latter for himself; and according to their findings upon the former, directing a verdict on the issue? The effect of that process is this, that it is the Judge, and not the jury, who determines the ultimate fact. No authority on the precise point was produced at either side; but the cases in libel were referred to; and in those cases unquestionably the Judge cannot resort to that process, but must send the mixed question entire to the jury. It was said that rested on the statute. But the statute was only declaratory; and though it in its terms dealt only with criminal prosecutions, the principle is now strictly acted on in civil actions. I confess I think it ought to be so in all those mixed cases. The parties have a right in my opinion to have the question go entire to the jury, with the opinion or advice of the Judge on the elements of law which it contains. The ultimate issue is one which the jury must affirm *as a fact*; and I do not see how it is possible to withhold from them any one of the elements of which that issue is composed. No doubt that involves this anomaly, that a jury may be affirming a point of law or of construction; but that is an anomaly inseparable from the nature of the tribunal to which we refer our questions of fact. I am not sure that justice is often the sufferer from it; and I do not think it would be here. I have my own opinion as to what would be just in this case, and what the jury would probably have found, if the case had been left to them. I can well understand that they would have thought that a condition of this kind, for destruction of a contract, should be strictly dealt with; that it should be construed as at the date of the contract—a construction fixed and uniform, and not varying according to the draught of such particular vessel, or the chances of the tide at the time of her arrival; and that when this vessel on the 12th of June dropped her anchor at Oyster Island, reported herself at the custom-house, and became subject to the customs and port dues,

T. T. 1862.  
*Common Pleas.*  
 MONTGOMERY  
 v.  
 MIDDLETON.



T. T. 1862. *Common Pleas.*  
 MONTGOMERY  
 v.  
 MIDDLETON.

that the condition was once for all performed, and that the delay which followed was merely an affair of lay days and demurrage, and possibly of deduction for special damage, if any such accrued from the delay. Thinking, as I do, that the question was one for the jury, it is not necessary for me to give any opinion upon the other question in the case, namely, if it were a case for a direction, in whose favor ought that direction to be? I do not think that question arises, which I regret; as I should have preferred disposing of the case in a way that would not involve further litigation; but it is very important to preserve, free from confusion, the line which separates the respective functions of the Judge and the jury; and I think the proper rule to make in the case is, to send it to be tried again.

KEOGH, J., said that he concurred in the judgment pronounced by CHRISTIAN, J., being unable to distinguish this case from that of *Lindsay v. Janson*.

BALL, J., said that, not having been present at the close of the argument, he took no part in the judgment of the Court.

MONAHAN, C. J.

In this case, I have the misfortune to differ from the two Members of the Court who have preceded me; and it will therefore be necessary for me to state, at some length, the facts of this case, and the grounds of the opinion at which I have arrived.—[His Lordship stated the facts of the special case, and the terms of the contract].—The question before us is, whether the vessel should have arrived at the quay of Sligo within the time limited, or whether an arrival at Oyster Island is sufficient? In other words whether, the jury having found all the facts and surrounding circumstances, is it for the Court to construe the written document, or whether I should have left to the jury to find what the parties intended by the contract which they made? This is a contract which, by the Statute of Frauds, must be in writing, and parol evidence of which could not be received. The general rule as to whose province it is to decide

such questions is laid down in the case of *Neilson v. Harford* (a). T. T. 1862.  
*Common Pleas.*  
**MONTGOMERY**  
**v.**  
**MIDDLETON.**

The question there was, what was the meaning of the words in the specification of a patent—"The shape of a receptacle is immaterial to the effect, and may be adapted to local circumstances." It was contended that the jury was the proper tribunal to decide the meaning of those words; but the Court held differently, Baron Parke saying, "We are clearly of a different opinion. The construction of all written instruments is for the Court, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been found as facts by the jury;" and he proceeds to show the mischief that would result from a contrary rule. Juries, he says, would give different meanings to the same contract; but when the construction lies with the Court, uniformity is attained. The same principle was laid down in *Hutcheson v. Bowker* (b). There, the defendants, by letter, offered to sell to the plaintiffs 400 quarters of *good barley*, weighing 52lbs. per barrel, at 34s. per quarter. The plaintiffs to this in their reply, after quoting the terms of the offer, wrote, "of such offer we accept, expecting you will give us *fine barley* and *full weight*." Evidence was given to show that the words "good" and "fine" were well known to the trade, and that fine barley was the heavier. The jury found for the plaintiff, stating their opinion that the difference was in weight, and that the barley would be fine and good at 52lbs. to the bushel. The Judge asked them to re-consider the verdict, and to answer the question whether there was a difference between *good* and *fine*? The jury answered that there was, but still persisted in finding for the plaintiff; which verdict was afterwards set aside, and a nonsuit entered, upon the ground that the jury having found "good and fine" to be different, it was altogether for the Court, and not for the jury, to say whether the plaintiff's letter amounted to an acceptance. Again, in *Wells v. Hopwood* (c), the same principle was acted on. There the question was, whether the ship had been stranded? The plaintiff was nonsuited, subject to the opinion of

(a) 8 M. &amp; W. 823.

(b) 5 M. &amp; W. 535.

(c) 3 B. &amp; Ad. 20.

T. T. 1862.  
*Common Pleas.*  
 MONTGOMERY  
 v.  
 MIDDLETON.

the Court on a case stating the facts. The Judges differed in opinion; but the majority held that the facts amounted to a stranding. The nonsuit was accordingly set aside; and ever since that case it has been held that a similar state of facts constitutes a stranding, and that whenever a question arises as to whether a vessel was stranded or not, it is for the Court to decide. In *Thompson v. Gillespie* (a), by the terms of the charter-party of a ship, stated therein to be at Sunderland, a portion of the freight was made payable in advance upon the sailing of the ship; the ship left Sunderland, but was not prepared for sea; the bill of lading was not signed; the mate not on board, and the crew not complete. At the trial, the Judge ruled that the ship had not sailed, reserving leave to the plaintiff to enter a verdict. It was afterwards, held upon argument, that the ship had not sailed; and no one suggested that it was for the jury to say whether the vessel had sailed. In *Parker v. Winlow* (b), the question was, whether there had been an arrival, so as to make the lay days commence? and that question was decided by the Court without reference to the jury. So also in *Kell v. Anderson* (c) and *Browne v. Johnson* (d), it was similarly held that a question as to what, in point of law, constituted an arrival, is for the Court, and not for the jury. But then it is said, that several cases have decided that, whether a vessel has arrived at her port of discharge or not, is a matter of fact for the jury to determine. Let us look at what were the facts left to the jury in those cases. In *Keyser v. Scott* (e), which was an action against an Insurance Company, the ship was warranted free from capture at her port of destination. She anchored one German mile outside of the bar of the harbour of Pillau, beyond where ships usually discharge any portion of their cargoes. The case having gone to the jury, a verdict was found for the plaintiff; and a conditional order having been obtained, the cause shown was allowed, on the ground that, even admitting she intended to make Pillau her port of destination, it was not possible to say

(a) 5 El. & Bl. 209.

(b) 7 El. & Bl. 948.

(c) 10 M. & W. 498.

(d) 10 M. & W. 331.

(e) 4 Taunt. 660.

she had arrived within the port, being so far outside the place where vessels were lightened. So, in *Reyner v. Pearson* (a); the ship was warranted free from seizure in port; she came to anchor about twenty English miles off Swinnemund, having lost a mast and anchor on the 1st of November. No vessel ever lightened her cargo or unloaded there. The captain went ashore to make inquiries, and the vessel, not yet being repaired, was captured on the 16th. Mansfield, C. J., directed the jury that, if the vessel was waiting outside of the port for the purpose of discharging, it might substantially be a lying in the port. The jury found for the plaintiff. On a motion for a new trial, Mansfield, C. J., said that, as the jury had decided that the vessel seized was not in the port of Swinnemund, the verdict ought to be upheld. But in that case it was not a question of the construction of a written document, as that admitted of no question; but it was simply a question of fact whether the vessel was within the port of discharge? In *Levin v. Newnham* (b), decided in the following year, a policy had been effected upon a ship bound for the Baltic, permitted to hail off any port for information, warranted free from capture in her port of discharge. The vessel cast anchor off Pillau Roads, eight or nine miles from the shore, to enable the supercargo to obtain information, or to discharge her cargo; and the question which the Judge left to the jury was, whether the captain had made Pillau the port of discharge? The jury found for the plaintiff, holding that he had not; and the Court refused a conditional order to set it aside. That was simply a question of fact, namely, whether a particular place was the port of discharge? In *Reyner v. Hall* (c), which arose on the same policy as that tried in *Reyner v. Pearson*, the parties had settled upon the supposition that the ship when taken was in the port of Swinnemund; but this, being done under mistake, was held not binding; and the plaintiff was held entitled to recover, the facts being the same as in *Reyner v. Pearson*. Then, with respect to *Dagleish v. Brooke* (d), let us see whether that was matter of construction or matter of fact. The vessel was

T. T. 1862.  
*Common Pleas.*  
MONTGOMERY  
v.  
MIDDLETON.

(a) 4 Taunt. 662.

(b) 4 Taunt. 722.

(c) 4 Taunt. 725.

(d) 15 East, 295.

T. T. 1862.  
*Common Pleas*  
 MONTGOMERY  
 v.  
 MIDDLETON.

warranted free from seizure within the port of discharge; and the question was, whether Pillau Roads was her port of discharge, the ship having anchored there for the purpose of discharging her cargo. It was held that she had arrived at her port of discharge, so as to entitle her to get a return of part of the premium. Lord Ellenborough told the jury that the port of discharge was the intended place of discharge; and it was held that that was a question of fact for the jury. The facts and decision in *Jarman v. Coape* (a) were similar. Then comes the case of *Whitwell v. Harrison* (b), in which all these cases were cited, and in which it was held that the question there was one which the Court had to decide. There, a vessel had been insured from Liverpool to Quebec, and thence back to her port of discharge, and until twenty-four hours passed in safety there; she had intended discharging her cargo at the plaintiff's wharf; but to do so had to discharge a great part thereof outside the bar before the wharf, where she remained several days, discharged her crew, and unloaded a great part of her cargo, intending to go to the wharf to discharge the remainder. Upon this state of facts, there being no fact in dispute, the Judge directed a verdict for the plaintiff, which was upheld by the Court. The plaintiff's Counsel referred to the cases in *East* and *Taunton*, as showing that it was a question of fact, and ought to have been submitted to the jury; but the Court held that those cases had no application to that before it, and that, the facts being clear, the Court, and not the jury, had to decide. *Lindsay v. Janson* (c) has been much relied upon by the plaintiffs; but let us consider the circumstances of that case. A policy of insurance had been effected upon a ship from Swan River to the Mauritius, and for thirty days after arrival. It appeared that the ships which intended to discharge their cargoes entered the harbour of Port Louis; but ships in ballast, as the one in question, anchored at the Bell Buoy, about two miles outside. The case was tried before Byles, J., who said that the words "to the Mauritius" meant the same thing as to "Port Louis," in the bottomry bond; that a ship being bound to a place must mean, being bound to a port in that place. Therefore the

(a) 13 East, 394.

(c) 4 Ex., N. S., 699.

(b) 2 Ex. R, 127,

question was, whether the Bell Buoy was part of the port of St. Louis? and he said that, taking the evidence to be true, it was a question of law; but he left to the jury to say whether the Bell Buoy was part of the Mauritius; and if not, whether there was any unnecessary delay? The jury found for the plaintiff on both points. Afterwards, on a motion for a new trial, Pollock, C. B., said:—"The question is one of fact, and was answered by the jury "as I would have answered it. It makes no proposition of law; "whether a vessel has arrived within a harbour, is a pure question "of fact. It cannot be compared to the question as to the meaning of "the specification of a patent. The meaning of the specification is "as much a matter of law as the construction of a will. Time and "place is always for the jury." Martin, B., said that it clearly meant an arrival at the place where ships of her character ordinarily anchor. Bramwell, B., said "it was a question of fact, what was the Mauritius?" These, and any similar cases which may be cited, merely establish the proposition that where the question is, whether a vessel had arrived, or was at a certain port, and a question arises whether a given spot is within that port, that may be a question of fact for the jury, who are to determine either, whether that place is in fact within the port, or whether the captain has made it his port? But no such question arises in the present case. There is no fact whatever in dispute. The only question is one of construction, and not of fact, namely, whether the vessel, according to the true construction of the contract, was bound to arrive at the quay of Sligo, on or before the 20th of June; or was it sufficient that she should arrive within the port of Sligo? There is not, however this case may be considered, any matter of fact in dispute between the parties. If the question were left to the jury whether the vessel had arrived, they would naturally ask "where? If you mean at the port, she had; if you mean at the quay, she had not." And if you leave to the jury the question where was she bound to arrive, what is this but to ask them what is the meaning or construction of the contract? As to the question, where was the vessel bound to arrive, having regard to the facts found, in my opinion the vessel was bound not merely for the port, but for the quay of Sligo. If the wind and tide permitted, it was her

T. T. 1862.  
*Common Pleas.*  
**MONTGOMERY**  
 v.  
**MIDDLETON.**

T. T. 1862.  
*Common Pleas.*  
MONTGOMERY  
v.  
MIDDLETON.

duty to have proceeded direct to the quay, without anchoring or delaying at Oyster Island. Her stay or anchoring there was merely accidental; just as in other harbours, vessels are detained outside, being unable to cross the bar; and whether she were detained there a few days, or only a few hours, cannot, in my opinion, make any substantial difference. I think, in principle, the case cannot be distinguished from *Samuel v. Royal Exchange Insurance Co. (a)*. It appears to me that neither a ship nor any other conveyance has *arrived* until she has got to the end of the journey. This vessel did not do so until her arrival at the quay of Sligo. There is no doubt that she would have been protected up to that period by the ordinary insurance; and having regard to the nature of the contract, the object being to have the actual possession of the cargo, I do not think that anything was to be done by the consignee until the arrival of the vessel at the quay. Payment and exchange of documents were not to be made until an opportunity had been afforded for examining the cargo at the quay. It is found as a fact that, upon arrival at the quay, liability to demurrage was to have commenced; but there is no such finding as to Oyster Island. Therefore my opinion is, that this question was a matter of law, and not a matter of fact, to be found by the jury; and I will add that, if the construction of this document be that the arrival of the vessel within the port of Sligo satisfied the terms of the contract, it is plain that she has so arrived; and therefore it would be putting the parties to an unnecessary expense to send the case to a new trial. In my judgment therefore the verdict ought to stand; but as a majority of the Court are in favor of granting a new trial, that portion of the conditional order must be made absolute.

(a) 8 B. & C. 119.

H. T. 1862.  
*Common Pleas*

**M'CARTHY, Administratrix of DONOVAN v. DONOVAN.\***

Jan. 17, 25.

**TROVER**, for household goods, farming stock, &c., the property of the plaintiff, as administratrix of Daniel Donovan deceased. The defendant, by his plea, traversed the fact of the conversion. At the trial before **KROGH, J.**, at the Cork Summer Assizes of 1861, it was proved that the deceased Daniel Donovan died on the 10th of January 1858, and that the defendant, his son, had possessed himself of his personal property, but had not taken out administration. It appeared that letters of administration were formally granted to his daughter Eliza M'Carthy the plaintiff, on the 7th of September 1860, and that the present action was instituted, at her suit, to recover the value of the property which the defendant had taken possession of.

In an action of trover by an administratrix against A, who had made himself executor *de son tort*, evidence was received, in mitigation of the damages against A, of payments made by him, which would have been allowed in a due course of administration by a rightful executor.—*Held*, that such evidence was properly received.

Evidence was tendered, on behalf of the defendant, of disbursements out of the assets, which would have been allowed in a due course of administration by a rightful executor. Counsel for the plaintiff objected to the reception of this evidence. The learned Judge, however, having permitted it to be given, it was proved that the defendant had made payments which would reduce the amount of the damages against him from £100 to the sum of nine shillings and sixpence. A verdict was then entered for the larger sum, with liberty to the defendant to move to have it reduced to the smaller sum, if the Court should be of opinion that the evidence ought to have been received, or for a new trial.

A conditional order having been obtained in Michaelmas Term 1861—

Serjeant *Sullivan* (with whom was *Exham*), now showed cause.

The evidence of the disbursements by the defendant was not properly received at the trial. *Plene administravit* could not have been

\* **CHRISTIAN, J.**, *absente*.



H. T. 1862. pleaded. The case of *Woolley v. Clarke* (a) is an express decision  
*Common Pleas.* in our favor. In that case the defendant had acted under a will of  
 M'CARTHY which he was appointed executor, and after notice of a subsequent  
 v. will, sold the goods of the testator. It was held by the Full Court  
 DONOVAN. of King's Bench in England, that the rightful executor was entitled  
 to recover the full value of the goods, and that the defendant was  
 not entitled to give, in mitigation of damages, evidence such as was  
 given here. There are some observations upon that case, at page  
 634 of *Williams on Executors*, which are not apparently justified  
 by the facts.—He also referred to *Mountford v. Gibson* (b), and  
*Thompson v. Harding* (c); *Carrigan v. Mullowney* (d).

*Chatterton* and *William Hickson*, in support of the conditional order.

The objection that *plene administravit* could not have been pleaded, does not apply. Where an executor *de son tort* is sued as such by a creditor, he may plead *plene administravit*; but it is otherwise when he is sued by the rightful executor or administrator, because he is then considered as a wrongdoer. But the cases from the earliest times show that an executor *de son tort* is entitled to be recouped in damages for all legitimate payments. He may give such payments in evidence in mitigation of damages. The case of *Woolley v. Clarke*, so strongly relied on for the plaintiff, cannot be considered as an authority on this question. The case is not accurately reported in 5 *Bar. & Ald.*, but is so in 1 *Dow. & Ry.*, p. 409. The defendant there took possession of the testator's assets for the purpose of retaining a portion for a debt due to himself.—They also referred to *Graysbrook v. Fox* (e); *Anonymous* (f); *Parker v. Kett* (g); *Whitehall v. Squire* (h); *Paget v. Priest* (i); *Fyson v. Chambers* (k); 2 *Bla. Com.* p. 508; *Bac. Abr.* B. 3, tit. *Executor*;

(a) 5 *Bar. & Ald.* 744.

(c) 2 *Ell. & Bl.* 630, 636.

(e) *Flow.* 282.

(g) 12 *Mod. Rep.* 471.

(i) 2 *Term Rep.* 100.

(b) 4 *East*, 441.

(d) 1 *Ir. Law Rep.* 254.

(f) 12 *Mod. Rep.* 441.

(h) *Carthew. Rep.* 104.

(k) 9 *M. & W.* 468.

2 *Phillips on Evidence*, p. 175; *Roseoe on Evidence*, p. 797; H. T. 1862.  
*Mayne on Damages*, pp. 44-5; *Williams on Executors*, p. 236. *Common Pleas*.

M'CARTHY  
 v.  
 DONOVAN.

*Bzham*, in reply.

*Cur. ad. vult.*

MONAHAN, C. J.

This case was tried before Mr. Justice KEOGH, during the last Munster Circuit. The action was one of trover, brought by the administratrix of a person named Daniel Donovan against Jeremiah Donovan. It appeared at the trial that the plaintiff Mrs. Carthy, was the sister of the defendant, and that at the death of their father Daniel Donovan, the defendant took possession of his farm and his personal property, the latter being under the value of £100. It appeared that he paid all the debts due by his father, and also his funeral expenses; all which would have been allowed in a due course of administration by a rightful executor. The question was, whether he could give the due administration of the assets in evidence, so as to reduce the amount of the verdict sought to be obtained against him? The learned Judge at the trial thought it right to receive the evidence, and it appeared that the defendant had disbursed all the assets which he had received, with the exception of a sum of nine or ten shillings. A verdict was then entered for the larger sum, leave being reserved to the defendant to move to have it reduced to the smaller sum, in case the Court should be of opinion that the evidence ought to have been received. The question is simply this:—if a party, not being executor or personal representative of a deceased person, takes possession of the assets, and acts as executor to all intents and purposes, and makes himself executor *de son tort*, can he give evidence in mitigation of damages, of payments amounting to the entire, or, as in the present case, to almost the entire value of the assets? A number of cases were cited by Mr. *Chatterton*, the earliest being so long ago as *Plowden*, in support of the principle that an executor *de son tort* will get credit for all the moneys applied in payment of debts. It is however settled that he is not entitled to credit for any sum due

Jan. 25.

H. T. 1862.  
*Common Pleas.*

M'CAETHY  
v.

DONOVAN.

to himself; and also, if the sums due to creditors should be larger in amount than the assets, he would not get credit for the sums he had disbursed; because in the event of the question of priority being raised, the rightful executor might, by such wrongful interference, be debarred from making a selection in his payments. I need not refer to all the cases, the earliest of which is in *Plowden*; followed by *Paget v. Priest (a)*: but I shall read a passage from *Williams on Exors.*, which is a fair commentary on the cases cited; it is at p. 236 of *Williams on Executors*, 5th ed.—“With respect to the liability “of an executor *de son tort*, at the suit of the lawful representative “of the deceased, there are several authorities to show that if the “rightful executor or administrator bring an action of trover or “trespass, the executor *de son tort* may give in evidence, under the “general issue, and in mitigation of damages, payments made by “him in the rightful course of administration, upon the ground that “the payments, which are thus, as it is termed, ‘re-couped in “damages,’ were such as the lawful executor or administrator “would have been bound to make, and therefore it cannot be “considered as any detriment to him that they were made by an “executor *de son tort*.” But it was urged, by Serjeant *Sullivan*, that in the case of *Woolley v. Clarke (b)* a different decision was come to by the Full Court, and that we were bound to follow it. The facts of that case were these:—The testator died on the 16th of June 1819; at the time of his death the defendant *Clarke* had in his possession a will of the testator, bearing date the 29th of April in that year, by which he was appointed executor. This will was proved on the 23rd of June 1819, and probate granted to *Clarke*, by whose directions several articles mentioned in the declaration were sold. The testator had made another will on the 12th of June 1819; by which he appointed the plaintiff executrix; and it was proved *Clarke* had notice of this will prior to the sale of the goods. The second will was proved on the 21st of May 1821, and probate of it was granted to the plaintiff. It was contended on the part of the defendant that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendant might show due

(a) 2 T. R. 100.

(b) 5 B. & Ald. 744.

administration of the assets to the amount of the value of the goods. The Lord Chief Justice would not allow the defendant to give evidence of the administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule *nisi* having been obtained for a new trial, very eminent Counsel appeared to show cause. In that case the argument was, that the property vested in the executor from the time of the death of the testator, and that consequently the defendant had no right to sell the goods as against the rightful executor. It was also contended that acts done through an executor, by a person who was ignorant that probate had been refused or unfairly obtained, were legal; and in support of that proposition the case of *Allen v. Dundas* (a) and *Parker v. Kett* (b) were referred to. The Chief Justice, in giving judgment, said, there was a manifest distinction between the case of an administrator and of an executor; he held that the property vested in the plaintiff, as executor, from the time of the death of the testator, and that consequently the defendants, who had notice of the second will, had no right to sell, and were therefore liable to the action. If that case were accurately reported, it would appear that the attention of the Court had not been called to previous cases on the same subject. Mr. *Williams*, in the passage to which I have referred, says that, it would appear to be contrary to previous decisions not alluded to, and that therefore it was very doubtful whether it should be considered as overruling them. We do not think it probable that the eminent Judges who decided, or the Counsel who argued, that case, could have overlooked the cases which were decided about that time, and which establish the principle, that an executor *de son tort*, in administering the assets of a deceased person, is entitled to be allowed credit for payments made in discharge of debts. We have been referred by Mr. *Hickson* to a report of this case in 1 *Dow. & Ryd.*, p. 409; and the facts of the case, as there reported, show clearly the foundation of the judgment, and that it is not contrary to those cases to which I have referred. At the trial it appeared in evidence that, in the month of April 1819, the testator made a will, by which he

H. T. 1862.

*Common Pleas.*

M'CARTHY

v.

DONOVAN.

(a) 3 T. R. 125.

(b) 1 Lord Raym. 658.

H. T. 1862.  
*Common Pleas.*

M'CARTHY  
v.

DONOVAN.

appointed the defendant Clark and another his executors. On the 11th of June in the same year he made a second will, by which he appointed the plaintiff sole executor, and on the 16th of that month he died. On the 21st the defendant Clark took upon himself the execution of the first will, and got possession of the testator's estate and effects, in order, as he declared, to retain for his own debt; and on the 23rd he obtained probate: there being distinct proof that he then had notice of the second will. The plaintiff subsequently obtained probate of the second will, and brought the present action. It was objected at the trial that the action could not be maintained, on the ground that the defendant Clark had acted under an existing probate lawfully granted to him; and that although he had notice of the second will, that circumstance made no difference in the case, inasmuch as he had acted under the authority of an existing probate. The cases of *Allen v. Dundas* and *Parker v. Kett* were cited to show that acts done under probate, afterwards revoked, are good; but no question appears to have been raised as to whether in case he had taken out no probate at all, he would have been allowed for payments duly made. At the trial the Judge was of opinion that these cases were not applicable, and the plaintiff had a verdict; the amount of the damages being referred. We therefore do not know but that they may have given him credit for all payments made to strangers, and merely refused credit for the debt due to himself, it being clearly settled that an executor *de son tort* cannot retain for his own debt. The Court merely said that there was no ground for the allegation that he was to be treated as acting under a regular probate, for he was at that time aware of the other will; and the Court gave no opinion with respect to the point involved in this case, the arbitrators having disposed of that. On the whole, we think that the report in *Dowl. & Ry.* must contain the true ground of the decision, and that it is no authority against the previous cases; and the present verdict must therefore be reduced.

It is stated that the account was taken at the trial hurriedly, and that the defendant got credit for a payment which ought to have been disallowed; he swore then that he had paid £36 to the land-

lord, but it now appears that the rent due to the landlord at time of testator's death was only £24, and that the defendant had precisely lent the deceased £12 to pay a portion of the rent which was paid. If this be so, the plaintiff must have a verdict for at least £12; therefore the proper order will be to direct that the verdict be reduced to £12, the defendant not being entitled to credit for this sum, which was a debt due to him by the testator at the time of his death.

H. T. 1862.  
*Common Pleas.*

M'CARTHY  
v.  
DONOVAN.

### BRISTOW v. BROWN.

Jan. 24, 25.

THIS was an action by the plaintiff, as one of the directors and registered public officers of the Northern Banking Company, to recover the sum of £300. 12s. 4d., being the amount of two promissory notes, of which the defendant was the maker. They each bore date the 10th of October 1860, and were made payable respectively three and six months after date.

To an action for £300. 12s. 4d., the amount of two promissory notes, the defendant pleaded (by way of defence on equitable grounds) that he had accepted a bill of exchange for the accommodation of A, and that A afterwards endorsed the same to the plaintiff, with notice that it had been accepted by the defendant as a surety only, and for the sole

The defendant pleaded by way of defence, on equitable grounds, "that, in the month of May 1857, he accepted a bill of exchange, "drawn by one James Maxwell, for £510; and that he so accepted "the said bill of exchange at the request of the said James Maxwell, as his surety, and in order to raise the amount thereof for "the use of the said James Maxwell; and that there never was any "consideration whatsoever for the acceptance or payment of the said "bill of exchange by the defendant; but the same was accepted by

accommodation of A; and that the plaintiff, without the knowledge and consent of the defendant, and for good and valuable consideration, gave to H time for the payment of said bill of exchange, beyond the time when same was due and payable; that, after the time for payment was so given, the defendant, upon the representation of the plaintiff's attorney that he was still liable for said bill, deposited certain title-deeds as security for the payments thereof, and that afterwards, for the purpose of obtaining possession of the said title-deeds, he made and gave to the plaintiff the promissory notes in the summons and plaint mentioned, and that, save as aforesaid, there never was any consideration for the deposit of the said title-deeds, or for the making of the said notes.—*Held*, upon demurrer, that this was a good equitable defence.

H. T. 1862. "him solely for the accommodation of the said James Maxwell; and  
*Common Pleas.* "that the said James Maxwell shortly after endorsed the said bill  
BRISTOW "of exchange to the said Northern Banking Company, at their  
v. "branch bank in Downpatrick; and that, at the time the said bill  
BROWN. "of exchange was so endorsed, the said Company had notice and  
"knowledge that the same had been accepted by the defendant as  
"a surety only, and solely for the accommodation of the said James  
"Maxwell; and the said Company took the said bill of exchange  
"with such notice and knowledge;" and the defendant alleged,  
that "the said Company, while being the holder of the said bill of  
"exchange, did, without the knowledge and consent of the defend-  
"ant, and for a good and valuable consideration in that behalf,  
"agree with the said James Maxwell to give him, and accordingly  
"did give him, time for the payment of the said bill of exchange,  
"beyond the time when the same was due and payable, and for-  
"bore, during that time, to enforce the payment of the said bill of  
"exchange. And that, in the month of March 1859, and after  
"time for payment had been so given to the said James Maxwell  
"as aforesaid, an application was, for the first time, made to the  
"defendant, for the payment of a sum of money then alleged to be  
"due on foot of the said bill; and that said application was made by  
"W. N. Wallace and Warnock, the attorney and solicitor of the  
"said Banking Company, and the attorney of the plaintiff in this  
"action, who then represented to the defendant that he was still  
"liable to the said Company on account of the said bill of exchange;  
"and proposed to the defendant to deposit with them certain title-  
"deeds, as a security for the payment of same; which the defendant  
"agreed to do; and the defendant accordingly deposited the said  
"title-deeds with the said Wallace and Warnock, as such security.  
"That the defendant, in the month of October 1860, applied to the  
"said Wallace and Warnock, and requested them, in the presence  
"of the manager of the said branch bank of the said Company,  
"to return to him the said title-deeds, which they refused to do,  
"save upon the terms that the defendant should then pay a sum  
"of £150 on account, and should make and give promissory notes  
"to the said Company for the balance of the sum then alleged

"to be due; and the defendant did then accordingly, for the purpose of obtaining possession of the said title-deeds, pay the said sum of £150, and make and give to the said Company certain promissory notes, two of which are the promissory notes in the summons and plaint mentioned." And the defendant further alleged that, "until after the commencement of this action, he never knew or had been informed that time for payment had been so given to the said James Maxwell; but, on the contrary, believed that he continued to be liable on account of the said bill of exchange; and that, save as before set forth, there never was any value or consideration for the deposit of the said title-deeds, or for the making or payment of the said promissory notes by the defendant."

H. T. 1862.  
Common Pleas.  
BRISTOW  
v.  
BROWN.

To the above plea the plaintiff demurred and replied.

Demurrer.—"Because it appears from such defence that the said defendant received a sufficient consideration for the making by him of the promissory notes mentioned in the summons and plaint; and because the said defence does not disclose such a state of facts, that a Court of Equity would absolutely and unconditionally enjoin the plaintiff from suing the defendant on foot of the said promissory notes."

*May* (with whom was *Joy*), in support of the demurrer.

There is no allegation in the plea that it was agreed by the bank that this bill should be an accommodation bill, or that the defendant was only a surety. Knowledge is not sufficient, unless there is also an agreement to acknowledge the rights of the parties: *Samuell v. Howarth* (a); *Fentum v. Pocock* (b); *Manley v. Boycott* (c); *Strong v. Foster* (d). If this action were upon the original bill, it is by no means clear that this would be a good defence. There is a consideration for these notes on the face of the plea. If a debt be due by one person, and another accepts a bill of exchange for the amount of it, payable at three months, he is bound to pay it; and there is a good consideration for it, by the fact that the creditor's remedy has been suspended for a certain time. The following cases were also

(a) 3 Mer. Rep. 277.

(b) 5 Taunt. 196.

(c) 2 El. & Bl. 46.

(d) 17 C. B. 201.



H. T. 1862. cited: *Baker v. Walker* (a); *Rayher v. Fussey* (b); *Smith v. Monteith* (c); *Haigh v. Brooks* (d); *Skeate v. Beale* (e); *Cornfoot v. Fowke* (f); *Milnes v. Duncan* (g).  
 Common Pleas.  
 BRISTOW  
 v.  
 BROWN.

*D. R. Pigot and Charles Andrews*, contra.

The case of *Strong v. Foster*, so much relied on by Mr. May, was decided not upon the pleadings, but upon the facts at the trial. The facts stated in this plea disclose an equitable case that the liability of the defendant to the debt on the original bill was discharged: *Davies v. Stainbank* (h); *Pooley v. Harradine* (i). The promissory notes were obtained from the defendant upon a misrepresentation which, on the facts, defeats any claim of the Company in respect of them. Supposing the attorneys had refused to give up the deeds without payment of the whole money claimed, and the defendant had paid it, if he could maintain an action for the money so obtained, the present is an *a fortiori* case. The cases are well collected in the note to *Marriott v. Hampton* (k).

They also referred to *Gibbon v. Gibbon* (l); *Gates v. Hudson* (m); *Newton v. Charlton* (n); *Skip v. Huey* (o); *Close v. Phipps* (p); *Mutual Loan Fund Association v. Sudlow* (q); *Rawlins v. Wickham* (r); *Reynolds v. Wheeler* (s); *Moss v. Hall* (t); *Scholfield v. Templar* (u); *Smith v. Bank of Scotland* (v).

*Joy* replied.

*Cur. ad. vult.*

MONAHAN, C. J.

Jan. 30.

This is an action brought by the public officer of the Northern

(a) 14 M. & W. 465.

(c) 13 M. & W. 427.

(e) 11 Ad. & El. 983.

(g) 6 B. & C. 674.

(i) 7 El. & Bl. 431.

(l) 13 C. B. 205.

(n) 2 Drew. 337.

(p) 7 M. & Gr. 586.

(r) 3 De G. & J. 304.

(t) 5 Ex. 46

(b) 28 Law Jour., Ex., 133.

(d) 10 Ad. & El. 309.

(f) 6 M. & W. 358.

(h) 6 De G., M. & G. 679.

(k) 2 Sm. Lead. Cas. 356.

(m) 6 Ex. 346.

(o) 3 Atk. 90.

(q) 28 Law Jour., N. S., C. P., 108.

(s) 30 Law Jour., N. S., C. P., 350.

(u) John. Rep. 155.

(v) 1 Dow. 272.

Banking Company against the defendant, as the maker of two promissory notes, in the sum of £100 each, and dated respectively the 10th of October 1860.—[His Lordship then stated the pleadings.]—The question for the Court is, whether the facts here pleaded afford a sufficient equitable defence to the present action? The first matter for consideration is, if this were an action on the original bill of exchange, of which Mr. Maxwell was the drawer, and the present defendant the acceptor, would the giving of time to Maxwell for payment, it being within the knowledge of the bank at the time the bill was endorsed to them that the defendant was merely an accommodation acceptor, afford a valid defence? It is not necessary to go into any general discussion on the well-known principle of Equity that, if a party for valuable consideration gives time to a principal, he thereby discharges the surety from liability. The general rule is, that a surety may at all times avail himself of all remedies against his principal. If therefore the holders of a bill of exchange deprive a surety of any of those remedies, they are responsible for doing so; and the surety is thereby discharged from liability.

We were referred to some cases to show that such a defence as that of giving time to the drawer of an accommodation bill was a discharge to the acceptor. It is not necessary for me to consider whether such would be a good legal defence, if pleaded to this original bill; nor do we express any opinion upon it; but we entertain no doubt that it would be a good equitable defence. Independently of the reason of the thing, a case has been decided by the very highest authority, next to that of the House of Lords, in a case of *Davies v. Stainbank* (a), which was an appeal to the Lords Justices from a decision of Vice-Chancellor Kindersley. It was a case in which, as in the present, a person accepted bills of exchange for the accommodation of the drawer, who lodged them with the Messrs. Stainbank, as a security for a floating balance due from time to time by him. Messrs. Stainbank, having notice that the acceptor was merely an accommodation acceptor, gave time for payment to the drawer. They afterwards sued the accep-

H. T. 1862.  
*Common Pleas.*

BRISTOW  
v.  
BROWN.

(a) 6 De G., M'N. & G. 679.

H. T. 1862.  
*Common Pleas*  
 BRISTOW  
 v.  
 BROWN.

tor on the bills; he pleaded payment, together with other pleas; but he did not plead the fact of the plaintiffs' having given time for payment to the drawer. Some time afterwards he filed a bill in Equity, for the purpose of obtaining an injunction to restrain the Messrs. Stainbank from proceeding further with their action upon the bills; and relief was sought for on a statement similar to that which is made in this defence: there was no material fact contained in it which is not in the present plea. After a full review of the cases, the Lords Justices came to the conclusion, first, as a matter of fact, that the plaintiff had accepted the two bills of exchange as a surety; next, that, by a binding agreement for valuable consideration, time had been given to the drawer for payment of the debt, without the assent of the surety; and they then held that the plaintiff was entitled to relief: and not only was the injunction continued, but they determined the case finally, and directed his name to be erased from the bills; thereby relieving him from all liability. There is another case, in the Court of Exchequer Chamber, *Pooley v. Harradine (a)*. It was an action to recover the amount of three promissory notes. The defendant pleaded that he made the notes for the sole accommodation of, and as the surety only for, a third party, to secure a debt due to the plaintiff; that the notes were delivered to the plaintiff, and accepted by him from the defendant, upon an express agreement between them that the defendant should be liable thereon as surety only; and that afterwards the plaintiff, without his consent, gave time to the principal; but for which he might have obtained payment. To that plea the plaintiff demurred. The defence in that case contains a statement, not to be found in the one before us, that the notes were endorsed to the holder under an agreement that the party should be considered as a surety. The learned Judge however, who pronounced the judgment of the Court, did not at all found it on the fact of this agreement, but proceeded altogether on the ground that the relation of principal and surety existed between the defendant and the principal debtor *inter se*, and that the plaintiff had knowledge of that fact when the notes were received by him, and when he entered into a binding agreement to give time to the

(a) 7 Ell. & Bl. 431.

principal debtor. Mr. Justice Coleridge seemed to be of opinion that such facts would form a good legal defence; but following the case in 6 *De G., M'N. & G.*, he decided that it was a good equitable defence on the grounds stated. We are therefore of opinion that, if the party had been sued on the original bill, the fact of the bank having given time to the drawer for payment, as stated in the present plea, would have been a good defence to that action.

We must next consider what is the effect of the matters which have since occurred between the parties. The first thing which occurred was, that the defendant was applied to for payment of the bill by Messrs. Wallace and Warnock, who were the solicitors for the bank; that application must clearly be considered as one on behalf of the bank; Messrs. Wallace and Warnock stating that his liability continued. In other words, that no change had taken place in the condition of the parties; that nothing had been done to change his liability. It is said that it is not stated in the plea that Mr. Wallace intentionally made any untrue statement; but there is no doubt, it is alleged that he made a statement which was untrue in fact; and, whether he knew it to be true or false, his principals of the bank must have known it. A principal, in a Court of Equity, cannot repudiate the acts of his agent; if the agent be guilty of false statements, by which another person is induced to an act prejudicial to him, that person will be relieved from it, just as if such statements had been made directly by the principal. For all purposes, the statement made by Messrs. Wallace and Warnock is of the same effect as if it had been made by the bank directors themselves. If Mr. Brown deposited those title-deeds in consequence of the untrue statement made by the Banking Company, or their agent, not being at the time aware that he was not liable to them, can anyone doubt that a Court of Equity would give relief? Not only would Equity have given him relief, but he might, in an action of detinue, in a Court of Law, have been entitled to recover back his deeds from Messrs. Wallace and Warnock, or from the bank. If a person should pay a sum of money, under a mistake of fact, to a party not entitled to it, though no false statement were made as an inducement to do so, he would be entitled to recover back that

H. T. 1862.  
*Common Pleas.*

BRISTOW  
v.  
BROWN.

H. T. 1862.  
*Common Pleas.*  
 BRISTOW  
 v.  
 BROWN.

money. If you should deposit deeds, under a mistake of fact, with a person who had no right to their custody; you would be equally entitled to recover them back. It is not necessary to refer to the very old authorities; the law is laid down very clearly in the case of *Milnes v. Duncan* (a). The facts of that case were, that the plaintiff was agent to the defendant, and having received some rent for him, he transmitted to him, in respect of the sum so received, a bill of exchange, which contained several endorsements. The holder of the bill, Mr. Duncan, omitted to present it when it became due; shortly afterwards he wrote to the plaintiff, informing him that the bill had not been honored. The plaintiff at once communicated with his bankers, who refused to take up the bill, as it had been so long overheld. On a communication being made to the defendant to that effect, he replied that the bill was a nullity, having been drawn on a stamp of insufficient amount. Milnes, in consequence, paid the amount to Mr. Duncan, and got from him the bill in question. He then ascertained that the bill, though payable in Liverpool, had been drawn in Ireland, and had the proper Irish stamp upon it, and was a perfect negotiable instrument. Having therefore paid a sum of money for which he was not liable, the question arose, as to whether he was entitled to recover it back, on the principle that he had paid money under a mistake of fact. Bayley, J., in giving judgment, said:—"If a party pay money under a mistake of the law, he cannot recover it back; but if he pay money under a mistake of the real facts, and no *laches* are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power), he may recover back such money." This qualification as to *laches* has not been approved of. The case of *Kelly v. Solari* (b) was an action brought by the plaintiff Kelly, as one of the directors of an Insurance Company, to recover from the defendant a sum of money, paid by the Company under a mistake of fact. The defendant, on the death of her husband, claimed to be entitled to the amount of a policy effected on his life; and it was accordingly paid by the Company. It turned out, as a matter of fact, that the

(a) 6 B. & C. 674.

(b) 9 M. & W. 54.

defendant's husband had omitted to pay one quarter's premium, and that, at the time of his death, the policy had become lapsed. It also appeared that the directors had been informed of the fact, but had forgotten it at the time of payment. The question then was, whether, under such circumstances, the plaintiff was entitled to recover back the money so paid? The learned Judge at the trial was of opinion that, if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover; and accordingly directed a nonsuit. The case afterwards came under the consideration of the Court of Exchequer. The judgment of Parke, B., is very clear, and overrules, to some extent, the statement of Mr. Justice Bayley, to which I have referred. He said:—"I think that, where money is paid to another, under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back; and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering, by *laches* in not availing himself of the knowledge in his power, seems, from the cases cited, to have been founded on the *dictum* of Mr. Justice Bayley, in the case of *Milnes v. Duncan*; and with all respect to that authority, I do not think it can be sustained in point of law. If indeed the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

H. T. 1862.  
*Common Pleas.*

BRISTOW  
v.  
BROWN.

It appears then very clear that, if deeds were deposited with  
VOL. 13. 27 L

H. T. 1862.  
*Common Pleas.*

BRISTOW  
v.

BROWN.

a party by mistake, under the influence of a false statement, a Court of Equity would compel them to be returned; or the person who deposited them would be entitled to recover them in a Court of Law. The next question is, are the holders of a bill of exchange given to obtain these deeds, which the party had no right or authority to retain, entitled to sue for the amount of it? The cases establish this, that if a party pays money, though with the knowledge of the facts, for the purpose of getting back deeds, the person to whom such money is paid has no right to retain it. I will not go through all the cases to which we have been referred. One case, that of *Wakefield v. Newbon* (a), is very precise. It was an action brought by a mortgagor against the mortgagee's solicitor, to recover a sum of money which the defendants had exacted from him, by refusing to redeliver his title-deeds after a reconveyance to him of the mortgaged property, on payment of principal and interest, unless the plaintiff would also pay the amount of the defendant's bill of costs. The verdict was taken for £11. 12s. 5d., being the amount so exacted; leave having been reserved to the defendants to move for a nonsuit, if the Court should think that the action was not maintainable. Lord Denman, C. J., in giving judgment said:—"We are of opinion that the defendants were "clearly wrong in withholding the deeds until the latter sum was "paid," &c. "But an objection to the maintenance of the action "was drawn from certain expressions employed by me in a late "judgment, of this Court, in *Skeate v. Beale* (b). That case was not "alluded to in *Parker v. Great Western Railway Co.* (c), in the "Common Pleas, where that Court, in conformity with a late decision "of the Exchequer, and with some former decisions of this Court, laid "down the principle, that money extorted by duress of the plaintiff's "goods, and paid by the plaintiff under protest, may be recovered in "an action for money had and received." There is a very recent case of *Gibbon v. Gibbon*, reported in 13 C. B., p. 205, and afterwards in 9 Exch., p. 346, which would be applicable to the present, if it had been an action for money had and received. The only other

(a) 6 Q. B. 276

(b) 11 Ad. & El. 983.

(c) 7 M. & Gr. 253.

case to which I shall refer is the case of *Bell v. Gardiner* (a). That was an action on a promissory note. The defence was, that the defendant Gardiner, before the making of the note, had endorsed a bill for the accommodation of one Martin, and had done so without having received any value or consideration for it; and that, before the bill got into the hands of the holder Bell, the date of it had been altered without his knowledge or consent, and that he remained ignorant of it until after the making and delivering of the note in question to the plaintiff. The question there was whether, at the time of giving the note, the defendant had any knowledge of the alteration in the bill? Tindal, C. J., said :—  
“The question is, whether this plea is sufficient, without further alleging that the defendant, at the time he gave the note, was also without the means of knowledge of the alteration of the bill?”  
The Court held that it was a good defence. The difference between that case and the one before us is very slight, except in the circumstance of depositing the deeds. If the notes in the present case had been given in discharge of the original bill, without notice of the facts which had occurred, the cases would be almost the same.

On the whole therefore we have come to the conclusion that this is a good equitable defence, and that this demurrer must be overruled.

(a) 4 M. & Gr. 11.

H. T. 1862.  
*Common Pleas*

BRISTOW  
v.

BROWN.



M. T. 1860.  
*Queen's Bench*

DU MOULIN and others v. J. DRUITT.

Nov. 19, 21,  
 23.

(*Queen's Bench.*)

A marriage between British subjects, at the celebration of which no ordained clergyman of the Established Church of England and Ireland intervened, is not valid at Common Law so as to avoid a marriage subsequently solemnized in due form, between one of the parties to the first marriage and a third party, and bastardize its issue.

EJECTMENT on the title, to recover possession of premises situated in North Earl-street, in the city of Dublin. The defendant took defence for the entire of the premises.

The case was tried before LEFROY, C. J., at the Sittings after Trinity Term 1860. At the close of the defendant's case it was admitted by all the parties that the only question in controversy was, whether a certain marriage ceremony constituted a valid marriage according to the law of this country? and thereupon the LORD CHIEF JUSTICE (by consent) directed a verdict for the defendant, subject to be turned into a verdict for the plaintiffs if the Court above should be of opinion that the evidence did not establish a valid marriage between Terence Burns and Margaret Lynch, on board the transport ship "Matilda," in the year 1817.

The evidence is fully stated in the judgments.

In 1825 George Drutt married Margaret Lynch, otherwise Burns. Joseph Drutt, junior, and the two female plaintiffs were the issue of that marriage. They all survived George Drutt; Joseph Drutt, junior, died on the 16th of March 1857, intestate and without lawful issue, leaving his sisters (the female plaintiffs) him surviving.

*Richard Armstrong*, on a former day in this Term, obtained a conditional order to turn the defendant's verdict into a verdict for the plaintiffs, pursuant to the leave reserved. Against that conditional order—

*Macdonogh, Otway and Byrne*, showed cause.

The validity of the marriage in 1817 could not have been questioned, except for the decision in *The Queen v. Millis*(a), that

(a) 10 Cl. & Fin. 534.

according to the Common Law of England, an ordained clergyman of the Established Church of England must be present at every marriage, in order to constitute it a valid contract. But the Common Law is local in its nature and character; varies according to the exigencies and necessities of social life; and applies to the colonies so far only as it is clear, unquestionable and necessary: *The Queen v. Millis* (a). In *Beamish v. Beamish* (b), a clergyman, acting on the old tenet that marriage is a sacrament which persons can administer to themselves, married himself; and that marriage has been declared valid. Prior to the Council of Trent (c), the general law of Europe decided that a contract of marriage *per verba de presenti* simply was valid; and the superaddition of a ceremony is not of the essence of the contract. Thus the necessity of the case would render valid a marriage between two British subjects who, having been wrecked on a desert island, intermarried. Edmund the Saxon King was the first who ordained that a mass-priest must be present at every marriage ceremony, in order to give it validity. But in *Dalrymple v. Dalrymple* (d), Lord Stowell stated that the Canon Law is the basis of the Marriage Law of Scotland and of Europe; and in the *The Queen v. Millis*, Lord Brougham deprecated a departure from that legal and ecclesiastical system of all Europe. In *Catterall v. Catterall* (e), Dr. Lushington held that he had jurisdiction to pronounce a decree of separation, although an ordained clergyman of the Church of England had not been present at the marriage. In *Maclean v. Crystall* (f), a marriage at which no ordained clergyman of the Church of England had been present, and which had been celebrated in India, was held valid, because British subjects carry with them the Common Law of England only so far as is necessary for them: *Whicker v. Hume* (g). That

M. T. 1860.  
Queen's Bench  
DU MOULIN  
v.  
DUBUIT.

(a) *Ubi supra*, pp. 799, 800.

(b) 6 Ir. Com. Law Rep. 142. But the judgment has been reversed in the House of Lords; 9 H. of L. Cas. 274.

(c) Hagg. Con. Reps. 82.

(d) 2 Hagg. Con. Rep. 54.

(e) 1 Robertson's Eccl. Rep. 583; *ib.* 304.

(f) Notes of Cases in Courts Eccles. & Mar., App. 18.

(g) 7 H. of L. Cas. 124.

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

the Common Law thus accomodates itself to the circumstances in which British subjects are placed, appears from certain statutes declaratory of it. The 57 G. 3, c. 51, s. 1, validated marriages celebrated in Newfoundland, without the presence of an ordained clergyman of the Established Church of England, if they were had under "circumstances of peculiar and extreme difficulty;" thus showing that the Common Law, which that statute declared, recognised as valid marriages had under circumstances which made it impossible to procure the attendance of an ordained clergyman. That statute did not render invalid such marriages already had in Newfoundland. The 58 G. 3, c. 84, is a similar Act with regard to marriages solemnized in India; and the 4 G. 4, c. 91, declared the law of England as to marriages celebrated abroad. The recitals of those Acts show that they were passed, not for the purpose of making such marriages valid, but to declare what the Common Law was; and to remove "the possibility of doubt" concerning the validity of those marriages. It would be absurd to suppose that the Common Law required the presence of an ordained clergyman at every marriage between British subjects, in whatever part of the globe it might be celebrated. Therefore a British vessel carries with it the Laws of England to that extent only which necessity requires; and the law recognises as valid the marriage of 1817, because it was impossible for the parties to procure the attendance of an ordained clergyman of the Established Church of England.

*R. Armstrong and Acheson Henderson*, in support of the conditional order.

The statutes 57 G. 3, c. 51; 58 G. 3, c. 84, and 4 G. 4, c. 91, so far from declaring that such exceptional marriages were good at Common Law, were passed *because* it required an ordained clergyman to be present at every marriage, without exception. Those Acts do not validate the marriage 1817. The Court must, in construing statutes, adhere to the ordinary meaning of the words used in them: *Warburton v. Ivis* (a). Therefore this case was not provided for by the 4 G. 4, c. 91, which contemplated marriages

(a) 1 H. & Br. 648.

celebrated within the lines of a British army serving abroad and engaged in actual warfare. The meaning of the words "British lines" is illustrated by the *Waldegrave Peerage case (a)*. On board the "Matilda" there were not any lines of a British army; and, even if there had been, the marriage would still have been invalid because not solemnized by "a chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad."—[*Sec. 1.*—The 58 *G. 3*, c. 84, recites that "doubts respecting the validity of marriages celebrated in India by clergymen of the Church of Scotland" had arisen; and made such marriages in future be "of the same and no other force and effect as if they had been solemnized by clergymen of the Church of England:" thus plainly showing that such marriages would until then have been invalid. The 57 *G. 3*, c. 51, did not legalise irregular marriages previously had; but left them to be dealt with according to the law, and enacted that such marriages should in future be valid if celebrated according to the provisions of that Act. To hold the marriage of 1817 good, would be to encourage collusive marriages, for persons may then sail out of sight of land and be married on board ship, without conforming to the English Law. There is no *lex loci* peculiar to a ship on a voyage, during which she constantly changes her position: nor are the persons on board exempted from the English Law of Contracts, a departure from which cannot be excused by such a necessity as is here alleged, "*matrimonia debent esse libera.*" Had the marriage of 1817 been solemnized in Ireland as it was on board the "Matilda," it would have been wholly invalid; and the parties were not freed from the obligations of the Law of England during the voyage. The Laws of England must have prevailed on board the "Matilda," which was an English vessel, chartered by the English Government, and under the control of their officers. If one of the soldiers had committed an offence, he would have been punished under the Mutiny Act; and any other criminal would have been punished under the Law of England. Persons on board ship cannot be allowed to disobey the Laws of England, by alleging that in their

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

(a) 4 Cl. & Fin. 649.

M. T. 1860.  
*Queen's Bench*

DUMOULIN  
v.

DRUITT.

opinion the circumstances rendered the illegal act necessary. If any necessity will justify a marriage without the presence of an ordained clergyman, it is not a temporary inconvenience during a voyage; it must at least be a *permanent* necessity, such as existed in *Maclean v. Crystal*, in which case it appeared that there were but three chaplains in the Presidency of Bombay. Yet even the decision in that case, where the necessity was manifest and permanent, is in direct opposition to that in *Lautour v. Teesdale* (a). The provisions of the 12 & 13 Vic., c. 68, s. 20, show that no law or statute had ever existed which legalised marriages had on board any ship, not even on board a man-of-war, unless an ordained clergyman was present. The 5 & 6 Vic., c. 113, is a Legislative decision that no marriage was valid under any circumstances, unless expressly excepted by statute, or celebrated in the presence of an ordained clergyman; for if any such marriage could be valid, there was no need to pass that Act. That the law is so was expressly decided in *The Queen v. Millis*, which has been recognised by the House of Lords itself, in *The Queen v. Carroll* (b), and on the authority of which *Catherwood v. Caslon* (c), was decided. In *Catherwood v. Caslon* the parties had acted *bona fide*. But in this case, the marriage of 1817 never was intended to be *bona fide*, for the woman did not live with Burns for a single day after the landing in Australia. In *Catterall v. Catterall*, although Dr. Lushington held that, *for the purposes of that suit*, the marriage was valid, he carefully refrained from saying that it was valid for the purposes of descents and inheritances. Before the passing of the Marriage Act (26 G. 2, c. 33, *Eng.*), the Temporal Courts never recognised a pre-contract of marriage unless there had been a subsequent marriage *in facie ecclesiæ* (d). The law of domicile is in the plaintiffs' favor, for no new domicile had been acquired prior to the marriage of 1817.—For these reasons that marriage was invalid; and the conditional order must be made absolute.

(a) 8 Taunt. 830.

(b) 10 Cl. & Fin. 907, n.

(c) 13 Mee. & W. 261.

(d) *The Queen v. Millis*, 1 Blk. Com. 439; Co. Lit. 33 a; Macqueen on Divorce, pp. 5, 6.

*Otway*, in reply.

The decision in *The Queen v. Millis* rested on a canon made by King Edmund. That canon is a rule *juris positivi* merely. Therefore *The Queen v. Millis* would not govern the case of a marriage had between British colonists who, upon leaving England, carried with them only such of the laws of England as were necessary and convenient for their changed condition and purpose; but not those which are *positivi juris*, and so inapplicable to their altered circumstances (a). It would be highly unjust to bind them by positive laws, which do not suit their new position, and are frequently changed without their knowledge. The same proposition is true of British subjects on board a British ship, once their return has been cut off. Such persons constitute a colony quite as much as if they had reached the colony. The law of England does not require an ordained clergyman to be present at a marriage when it is not possible for the parties to procure one. Therefore the rule which requires that an ordained clergyman shall be present at every valid marriage was not in operation on board the "Matilda," because of insurmountable difficulties which prevented its observance: *Maclean v. Crystal*; *Ruding v. Smith* (b); *Kent v. Burgess* (c).—[LEFROY, C. J. What was the *lex loci* on board the "Matilda"?]—The law of England was the *lex loci* on board the "Matilda;" but only so far as it applied to the condition and purposes of those on board. The 58 G. 3, c. 84, declares what the Common Law is in India only. It was argued for the plaintiffs that, without the 57 G. 3, c. 51, the particular acts legalised thereby would have been illegal. But the Common Law remains unchanged until altered by statute (d); and the 57 G. 3, c. 51, instead of altering, merely declared what the Common Law was; and the proviso in its 1st section establishes the defendant's case. The Common Law is flexible, and adapts itself to circumstances: *Lawton v. Lawton* (e). The decision in *The Queen v. Millis* did not pronounce invalid, for

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

(a) 1 Bl. Com. 187.

(b) 2 Hag. Cons. Rep. 391.

(c) 11 Sim. 376.

(d) Co. Lit., 115, b; Dwarria on Stat. 116.

(e) 3 Atk. 15.

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
 v.

DEUITT.

all intents and purposes, a marriage at which an ordained clergyman had not been present: *Catterall v. Sweetman* (a). A greater necessity existed on board the ship than in India, where the parties might have travelled to the nearest chaplain; yet the marriage in *Maclean v. Crystal* was upheld. *Catherwood v. Caslon* cannot rule this case, for it was sent to a new trial to determine what was the *lex loci* at Beyrout. In the 4 G. 4, c. 91, the word "abroad" means no more than "out of one's country;" and the phrase "British lines" does not presuppose a state of actual warfare, since England was at amity with France when the marriage, which occasioned the *Waldgrave Peerage case*, was solemnized. The ship's deck was within "British lines," for the sentinels were at their posts under British military law. The invalidity of the marriage of 1817 cannot be inferred from the 12 & 13 Vic., c. 68, s. 20, because every description of marriage mentioned there would have been invalid unquestionably, except for that Act, since the *lex loci* must have prevailed on the foreign stations.

*Cur. ad. vult.*

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LEFROY, C. J.

This case comes before the Court upon a consent-order entered into by the parties at the trial, whereby it is agreed "that the verdict be directed for the defendant, subject to be turned into a verdict for the plaintiffs, if the Court above shall be of opinion that the marriage had on board the transport ship "Matilda," in the month of April 1817, between Terence Burns and Margaret Lynch, was not a valid marriage." This was the point which was reserved at the trial; and accordingly the case has come before the Court, and has been argued by Counsel on both sides. The question no doubt is a question of very considerable moment, and one to which we have given every attention. I will state shortly the evidence which was given on this point at the trial. I will state, in the first instance, the evidence given by Colonel Vandermulen, who, at the time of the marriage in the year 1817, was a Lieutenant in H. M. 48th regiment of foot,

(a) 4 Notes of Cases in Courts Eccl. & Mar. 224.

and was then on board the transport ship. He states that, in the month of March 1817, he was an officer serving with the head-quarters detachment of H. M. 48th regiment of foot, then on board the transport ship "Matilda," which sailed from Cork on the 28th of March 1817; that Major Druitt was also an officer of that regiment, and on board; that there was a private soldier, named Terence Burns, in that regiment, who also was on board; that, some days after the ship had sailed from Cork, it was discovered that a woman had come on board, and that this discovery was made at a time when they were at such a distance from land, and so far out of sight of it, that it was out of the question to attempt to send the woman back again; and that the ship proceeded on her voyage. But Colonel Erskine, the officer who was in command of the 48th regiment, upon a report which was made to him of the circumstances relating to the discovery of the woman, thought it right that a marriage should take place between her and the private Burns; and accordingly, by command of Colonel Erskine, a marriage between the woman (named Margaret Lynch), and the private soldier Terence Burns, took place on the quarter-deck of the ship, on the 4th day of April 1817. Colonel Vandermulen further states that, by military custom, the ship was then the head-quarters of the regiment, as the officer commanding the regiment was on board. Colonel Vandermulen states that he himself was the acting adjutant of the regiment, and that he attended the marriage as staff-officer; that some of the officers and some of the private soldiers also attended on the occasion; that Captain Somerville, a lieutenant in the Royal Navy, who was the civil commander of the ship, read the marriage service from the book of common prayer, according to the rites and service of the Church of England; that the service was read as fully as it would have been if they were in a parish church in England,\* and that Major Druitt gave the responses; that the

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

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\* It also appeared that a ring was used on the occasion, and that a place among the married soldiers was then assigned to T. Burns and the woman. There was not any other evidence of cohabitation.



M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

marriage was registered in a military book, which contained the marriages of the soldiers in that regiment, and was appropriated to that purpose, and that the entry was witnessed by him (Colonel Vandermulen) officially. He states that the ship arrived at Sydney, in New South Wales, on the 24th of August 1817; that Major Druitt took a cottage, and that the woman, immediately after the troops had landed, went to Major Druitt, and remained with him; and that it was matter of notoriety that from thence they were living together as though they had been man and wife. That, from the time the troops landed, the woman never lived with Burns, her supposed husband. That, some time afterwards, Colonel Vandermulen discovered that that leaf of the regimental registry book, on which the marriage had been recorded, had been taken out. These I think are the material circumstances relating to the marriage on board the transport ship; and it is to be taken as an admitted fact that, in the year 1825, Major Druitt married this woman, and that Burns, her supposed husband, was then alive, and did not die until the year 1847.\* The question then as to the validity of the second marriage turns upon the validity or the invalidity of the first marriage; because, at the time when the second marriage was solemnized, Burns was still alive; and therefore the whole case comes round to the single point which, as I have stated, was reserved at the trial, namely, whether the marriage had on the quarter-deck of the transport ship during her voyage to the British settlement of Sydney in the year 1817, was a valid marriage? The learned Counsel for the defendant contended that the marriage had in the year 1817 was valid, first of all, upon the ground that the case of *The Queen v. Millis* had not precisely or definitely, and for *all* purposes, established the law of England for *all* the subjects of the realm. The great point which the decision in that case established was, that some person in holy orders must be present at and intervene in the ceremony of marriage, in order to make the marriage valid according to the law of England. But that supposed the possibility of such

\* T. Burns left the service in 1818, and returned to Ireland. In 1826 or 1827 he married another woman; and died in 1847.

a presence and intervention ; but there was not any chaplain or person in holy orders on board the transport-ship "Matilda," during her voyage in the year 1817 ; and therefore, upon the occasion of the marriage between Terence Burns and Margaret Lynch, there was no possibility of the intervention of any person in holy orders. It was therefore contended that the decision in the case of *The Queen v. Mills* left an opening—a flexibility, in the law regulating marriages, which enabled parties, under circumstances of great and insurmountable difficulty, to contract a marriage consistently with the decision in that case, although without the intervention of any person in holy orders. It was further argued that this doctrine of the flexibility of the English law of marriage is very much countenanced and supported by the law of marriage as it was contended to exist amongst those subjects of the realm who are colonists, who have been sent out to plant or to people newly discovered territory ; for that such persons, although *prima facie* they carried with them to their new abode the Laws of England ; yet carried in reality with them those laws only so far as was suitable to their new circumstances. Furthermore it was contended that colonists can contract marriages, which will be held valid in England and Ireland, without the intervention of a person in holy orders ; that the present case comes within the analogy of that rule and of that recognition ; for it was contended that there existed authorities recognising this sort of marriage, and that the marriage, upon the validity of which we are now to determine, falls within the reason and the analogy of that class of cases. It was further contended that there are now in force Acts of Parliament which recognise such marriages ; that those Acts of Parliament would bear to be interpreted as declaratory laws recognising that sort of marriage ; and that Acts of Parliament have been passed expressly for the purpose of relieving and accommodating subjects going abroad and contracting marriages while abroad ; and also that Acts of Parliament have been passed to regulate marriages contracted by military persons while serving abroad, and to regulate marriages contracted on board ships of war on foreign stations ; and that all these Acts of Parliament would, when duly considered, be found to

M. T. 1860.

*Queen's Bench*

DU MOULIN

v.

DEUITT.

M. T. 1860.  
*Queen's Bench*

DUMOULIN  
 v.

DEUITT.

support the principle that a marriage of this sort had been either expressly provided for by the Legislature, or at least came within the reason and the principle upon which those Acts of Parliament are founded. Now it might at the outset be answered, as to the case of colonists, that, even supposing all that has been said with respect to the law in relation to colonists, or persons peopling or planting newly discovered territories were true, it is met by saying that such was not the condition of the parties who contracted the marriage which is now under consideration. In point of fact, those parties were not in any degree in the position of colonists who had quitted the mother country with a view to form, and who did form, a domicile in another place, and made there a new home for themselves. The parties in the present case not only did not go abroad with a view to remain abroad, but they went abroad under circumstances which made it an imperative duty for them to return. They were members of a military force which had no will or choice of its own, but must certainly come back to England, the mother country. This short answer might therefore be given at once to that portion of the reasoning on which it was attempted to support this marriage. When it was contended that the marriage contracted on board the transport ship might be held valid, upon the ground of an analogy drawn from the case of marriages contracted in foreign countries, and which are governed by the *lex loci*, I asked the learned Counsel who closed the argument, "What was the *lex loci* on board the transport ship during her voyage to Sydney?" He replied, "The law of England." Well then, if the law of England was the *lex loci* to regulate marriages contracted on board the transport ship, the question resolves itself into this—what was the English law of marriage in England at that time? And that brings me round to the first question, namely, has the decision in the case of *The Queen v. Millis* settled the law of marriages in England fully, imperatively, and conclusively? Without wasting time in going through the arguments in that case, it is enough to say that the decision was final, and was a decision come to by the House of Lords, after it had heard the unanimous opinion of the Twelve Judges of England upon the subject. Immediately after

the close of the argument in a similar and subsequent case, *The Queen v. Carroll* (a), the House of Lords entered up a similar judgment, which of course was a recognition and confirmation of the decision in the case of *The Queen v. Millis*; and afterwards the Court of Exchequer in England, in *Catherwood v. Caslon* (b), fully recognised the decision in the case of *The Queen v. Millis*, as having settled the law of England with respect to marriages. Indeed, when I look back to the decision of the Court of Error in this country in the case of *Beamish v. Beamish* (c), which was decided at no very distant date, I must be prepared to stultify myself and my learned brethren, if I could for a moment entertain a doubt but that the decision in the case of *The Queen v. Millis* had definitively settled the law of England with respect to marriages. And unquestionably, when a person considers how large a measure of civil rights, duties, and obligations arise upon the question of the validity of a marriage, it would be a most inconvenient thing if it could be supposed that there exists a principle such as this, that the law of England relating to marriages is a flexible law, which yields to circumstances, and which parties may apply to their own case or not, just as it suits their convenience and the position into which they think fit to bring themselves. It is much more important, and is always more material, that the law upon any subject be certain and precise, than that it be of any particular character. When parties can be assured of what the law actually is, they will regulate their conduct accordingly; and all decisions calculated to introduce doubt into the law are to be regretted. I should therefore be sorry it were to be supposed we entertained the smallest doubt in saying that the marriage contracted on board the transport ship, in the year 1817, cannot be sustained upon the ground that the decision in the case of *The Queen v. Millis* has left the law of England on this subject in a state of uncertainty, or, as it has been said, of flexibility. But then it is said that the law of England, in the consideration which it has for persons placed in the position of colonists, does enable persons placed in that position to adopt the law of England, or to

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DEUITT.

(a) 10 Cl. & Fin. 907, note.

(b) 13 Mee. & W. 261.

(c) 6 Ir. Com. Law Rep. 142.

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
 v.

DRUITT.

reject a portion of that law, which may not be suitable to their circumstances. I doubt exceedingly whether that statement of the law of England, as it relates to colonists, is a correct statement of the law, at least in the way in which it is sought to apply that law to this case. If colonists do not take with them all the laws of England, they do not take with them such laws as are not suited to their circumstances. But that is an exemption from the laws of England very different from the exemption which is claimed, when it is asserted that colonists may take a part only of any particular law as it is recognised in England, and that the mother country will recognise the rejection of the other part of one of its own laws. Colonists may reject altogether any one law of the mother country, if that law does not suit their circumstances; but it is quite another thing to say that colonists, by adopting a portion, and rejecting the remainder, of one of the laws of the mother country, can create a right which is to affect the devolution of property in the mother country. Colonists may make any adjustment they please of their own laws relating to their property in the colonies; but that is a very different thing from binding the rights of property in the mother country. But, furthermore, what authority or decision is there either in the civil or in the ecclesiastical law of England that a marriage, which has been celebrated in the colonies, without the intervention of a person in holy orders, has ever been held valid so as to bind civil rights in the mother country? Not a single authority has been cited, nor could one be cited, recognising that species of marriage which it has now been attempted to show forms a part of the law of Europe. There never has been, so far as I can find, any decision in England which recognised such a marriage as valid for the purpose of binding the rights of property in England. The defendant's Counsel indeed adverted to three statutes, 57 G. 3, c. 51; 58 G. 3, c. 84; 4 G. 4, c. 91, in order to eke out the doctrine for which he contended; but there is not one of those three statutes which does not afford distinct evidence that such marriages are *not* valid for the purpose of binding the rights of property in England. Why should Acts of Parliament have been passed to validate marriages had in the colonies, that is to say, irregular marriages of this sort, had

there, without the intervention of a person in holy orders? Those statutes not only give validity to such marriages, upon the ground of the great mischief and inconvenience which would arise if those marriages were questionable, but also provide a species of marriage which should for the future be held as valid as if they had been celebrated by a clergyman in holy orders—celebrated too according to the strict law of England—so that these very statutes recognised the fact that such irregular marriages were not valid by the law of England, because they gave validity to such marriages in future, when celebrated in the colonies, on the condition that, if they were conducted in pursuance of the legislative provisions contained in those statutes, they should have the same effect as they would have had supposing them to have been celebrated exactly in pursuance of the system established by law in England. Those statutes too, without one exception, after directing the form of marriage in fact which should in future be observed in the colonies to which those statutes apply, give this relief, not in the way of recognising such irregular marriages already had, but on the contrary give the relief in the way of express statutory enactment, validating all such marriages in future times; which is decisive evidence that the colonists had no such privilege as, in this case, it has been insisted they did enjoy; and that the law of England on the subject of marriage is not so flexible a thing as that the colonists could take one part of it and reject the rest. On the contrary, those statutes amount to a special legislative declaration that, at least *quoad* marriages, the colonists of England had no such privilege or authority as between the mother country and the colony.

But it is said that there are Acts of Parliament which contain regulations for the celebration of marriages amongst military persons who are serving abroad, and for the celebration of marriages on board ships of war of the royal navy at foreign stations; that the present case, although it cannot be said to come within the words of those statutes, yet does come within their reason and spirit; and that marriages had amongst military forces serving abroad—marriages had within the lines of a British army in foreign countries—and marriages had on board British ships of war on foreign stations,

M. T. 1860.

*Queen's Bench*

DU MOULIN

v.

DRIUITT.

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
 v.

DRUITT.

are all validated and provided for if the parties follow, not the general law of Europe, but the particular mode and form provided by the Legislature. And it might be enough to say, that prescribed mode and form is not the one which has been followed in the present case. But indeed there is no ground whatever to maintain the applicability of those statutes to this case.

There has been another class of statutes passed in order to relieve subjects going abroad, and to provide for cases in which their marriages could be sustained only when such marriages were had according to the *lex loci* in which they were celebrated. That class of statutes renders valid, marriages which are contracted by British subjects while abroad, and which would have been invalid, provided that they are celebrated with the intervention of some person in holy orders; but it leaves all the rest of her Majesty's subjects, who marry abroad, to establish the validity of their marriages by marrying in accordance with the *lex loci*; and in order to make such marriages valid, it must be shown that they were in fact celebrated according to the *lex loci*. But what was the *lex loci* in the present case? On board the transport ship "Matilda" there was no *lex loci* other than the law of England, in all its strictness. That fact was admitted by the learned Counsel for the defendant; and the very moment that admission is made, to hold that the marriage in the present case was valid, would be to place the parties who were on board that ship in better circumstances than any other subjects of the Crown. All other subjects must conform either to the *lex loci* or to the law of England; whereas in this case it was contended that the parties can both dispense with what the law of England, as to one of its most material elements, requires, and can also choose for themselves what sort of marriage may suit their convenience. But, really, even if it could be established that British colonists enjoy an exemption from precise conformity to the English law of marriage, the whole doctrine which affects to give to persons in the condition of those who were on board the transport ship "Matilda," and who had never changed their relation to the mother country, a similar exemption, is quite beside the question which we have to

determine. The persons in this case were not colonists; and if they were, in order to validate their marriage, they must follow the prescriptions given by those Acts of Parliament which apply to colonists. Upon the whole therefore, it appears to me that there is no ground on which to sustain this marriage; that it would be most unfortunate for the public if this doctrine of the flexibility of the English law of marriage were to be established, and civil rights made to depend on so vague a principle.

I am therefore, on every ground, clearly of opinion that the cause shown should be disallowed, and that the verdict had for the defendant should be changed into a verdict for the plaintiffs.

O'BRIEN, J.

I am also of opinion that a verdict should be entered for the plaintiffs, pursuant to the liberty reserved. The question is whether, *according to the laws of this country*, the ceremony or contract of marriage, which was celebrated or entered into on board the transport ship in 1817, between Margaret Lynch and Terence Burns, as detailed in the evidence) constituted a valid marriage, so as to render invalid the subsequent marriage which was duly solemnized in 1825 (in the lifetime of Terence Burns), between the same Margaret Lynch and Major Druitt. It appears to me that this case is ruled by the decision of the House of Lords in *The Queen v. Millis (a)*. In that case it was the unanimous opinion of the English Judges, who were consulted by the Lords, that according to the Laws of England such a contract did not constitute a valid marriage, unless it was made in the presence and with the intervention of a minister in holy orders. It is true that the Law Lords in that case were equally divided in opinion on the question, and that the decision against the validity of the marriage was made by reason of the rule that, when the Lords are equally divided upon an appeal or writ of error, the judgment of the Court below should be affirmed. But the decision in that case is not the less binding as a declaration of the law, than if it was made by an actual majority of the Lords; and we find that, in subsequent cases, its authority has been recognised

M. T. 1860.  
*Queen's Bench*  
DU MOULIN  
v.  
DRUITT.

(a) 10 Cl. & Fin. 534.



M. T. 1860.

*Queen's Bench*

DU MOULIN

v.

DEUITT.

and followed. It was acted on by the House of Lords in the case of *The Queen v. Carroll* (a), which was decided by them immediately afterwards; and in the subsequent case of *Catherwood v Caslon* (b), Baron Parke distinctly stated that it was binding on the Court, and they followed it accordingly. Such then being the state of the Law of England on this question, it is clear, and was almost conceded in the argument, that the *lex loci* on board the transport ship was the Law of England. It would indeed be difficult to contend that the parties in question were not then subject to that law, or that they could be regarded as colonists who had left their mother country, or as persons who had acquired a domicile in another place; and it would therefore appear to follow, as of course, that the marriage in question should be held invalid. Defendant's Counsel however contend, that the general rule established by *The Queen v. Millis* was not an inflexible one, and that the application of it as the *lex loci* to marriages, should be modified according to the circumstances and exigencies of each case; and that accordingly various exceptions to this general rule have been made both by legislative enactment and judicial decision, and that the circumstances of this case bring it within the principles of those exceptions. But upon referring to the statutes and authorities relied on by defendant's Counsel, it will I think be found that they do not establish any principle of exemption applicable to the present case, but that on the contrary some of them afford grounds for holding (independently even of the decision in *The Queen v. Millis*), that the Law of England as to marriages was in accordance with that decision, and that therefore the marriage in question was not valid according to such law.

The first statute on which defendant's Counsel rely is the 59 G. 3, c. 51, entitled "An Act to regulate the celebration of Marriages in Newfoundland." It recites that "a doubt had existed "whether the Law of England requiring religious ceremonies in the "celebration of marriages to be performed by persons in holy orders, "for the perfect validity of the marriage contract, was in force in

(a) Cl. & F., note at the end of *The Queen v. Millis*.

(b) 13 M. & W. 264.

"Newfoundland; and that, by reason of this doubt, marriages had been of late celebrated in Newfoundland by persons not in holy orders." Now this recital appears to be a legislative declaration that, according to the Law of England the intervention of a clergyman in holy orders was essential to the validity of the marriage. The statute then enacts, "That after the 1st of January 1818, all marriages had in Newfoundland should be celebrated by persons in holy orders, and that all marriages to be contracted or celebrated in Newfoundland, contrary to that Act, after said day, shall be null and void." Then follows the proviso or exception on which defendant's Counsel rely, as showing the policy and intention of the Legislature to give validity to marriages had under circumstances such as those in the present case. The statute declares that nothing in it "should extend to marriages had under circumstances of peculiar and extreme difficulty in procuring a person in holy orders to perform the celebration, and in which the law might, on that account, otherwise determine on the validity of such marriage," *provided however* "that in all such cases the circumstances and the contract should be certified on oath to the nearest magistrate, or to such other person as therein mentioned." How does this statute assist defendant's case? It declares the Law of England to be, that marriages should be performed by persons in holy orders; it applies that general law to Newfoundland, but exempts from its operation marriages had under such "circumstances of peculiar and extreme difficulty" as therein mentioned, "provided however that such circumstances should be certified on oath," &c. Now with respect to this and the other statutes relied on, I may observe that the fact of the Legislature having expressly enacted that marriages celebrated in particular localities and under certain specified circumstances, should be exempted from the operation of the general rule of law, would not authorise us to extend the exemption to marriages had in other localities and under different circumstances, even though we should be of opinion that it would have been equally expedient for the Legislature to have done so. The next statute referred to is the 58 G. 3, c. 84, which was passed to remove doubts as to the validity of marriages solemnized within the

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

M. T. 1860  
*Queen's Bench*

DU MOULIN  
 v.

DEUITT.

British territories in India, by ordained ministers of the Church of Scotland. It recites the existence of doubts as to the validity of such marriages, and declares that all marriages celebrated before the passing of the Act, by such ministers, should be equally valid "as if same had been solemnized by clergymen of the Church of England;" and it contains a similar enactment with respect to marriages to be solemnized by such ministers after the passing of the Act, provided that both or either of the parties belong to the Church of Scotland, and provided certain formalities therein mentioned be complied with. I do not see what further ground of argument in support of defendant's case is afforded by this statute.

But the statute on which defendant's Counsel principally rely is the 4 G. 4, c. 91, followed by the 12 & 13 Vic., c. 68. The former of these Acts was passed for the purpose of removing all doubts "concerning the validity of marriages solemnized *by a minister of the Church of England* in the chapel or house of any British Ambassador, or minister residing," &c.; "or in the chapel of any British factory," &c.; and also all doubts "concerning the validity of marriages solemnized *within the British lines* by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad." And it enacts "that all such marriages shall be held to be as valid in law as if same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law." It then provides (by section 2) that "nothing in said Act should confirm, impair, or in anywise affect the validity of any marriage solemnized beyond the seas, *except those solemnized in the places, form and manner in said Act specified.*" Now it cannot be contended that the marriage in question, solemnized on board a transport ship conveying troops from Cork to Sidney, should be considered as coming within the description in that statute of "*a marriage solemnized within the British lines.*" And the statute expressly provides "that the privilege granted thereby should not extend to any marriages except such as are specified in the Act." The marriage in question is not one of those, and can therefore derive no validity from the statute. The last statute referred to is the 12 & 13 Vic., c. 68,

which was passed for the purpose "of affording greater facilities for the marriage of her Majesty's subjects resident abroad." It recites in effect that the provisions of said previous Act (4 G. 4, c. 91) were applicable only to marriages solemnized by the persons, and in the places, manner and form in the previous Act specified; and that "large numbers of her Majesty's subjects were resident abroad, at places where the provisions of that previous Act were not applicable, and that it was expedient to afford greater facilities for the marriage of her Majesty's subjects resident abroad." It then enacts that future marriages in any place abroad, where there was a British Consul duly authorised, may be duly solemnized by or in the presence of such Consul, in the manner and with the formalities prescribed by the Act; and that when so solemnized they should be as valid in law as if same had been solemnized within her Majesty's dominions, with a due observance of all forms required by law. It then recites (section 20) "that many marriages had been entered into abroad by British subjects under circumstances which might occasion doubts as to the validity of such marriages;" and that it was expedient such marriages should be confirmed in the cases thereafter mentioned: and it declares that all marriages of British subjects which, before the Act, had been celebrated by ministers of the Church of England, Ireland or Scotland, in certain places therein specified; and also all marriages of British subjects which before the Act had been solemnized according to any religious rites or ceremonies, or contracted, *per verba de presenti*, in the presence of a British Ambassador, &c., "*or on board a British vessel of war, on any foreign station, in the presence of the officer commanding such vessel;*" and also all such previous marriages as had been registered, as therein mentioned, "should be as valid as if they had been solemnized within her Majesty's dominions with a due observance of all forms required by law." With respect to these provisions, it is clear they do not apply to the marriage in question, because the transport ship on which it was celebrated could not be considered as coming within the description of "a British vessel of war on a foreign station;" and also because (even if it were so considered) there is a subsequent proviso in that section that the Act

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

M. T. 1860. *Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

should not extend to render valid "any marriage where either of the parties had afterwards, during the life of the other, lawfully intermarried with any other person." And in the case now before us there was such a subsequent marriage, in 1825, between Margaret Lynch and Major Druitt. It is clear therefore that the marriage in question (that of 1817) does not derive any validity from the several statutes relied on, as it does not come within the description of those marriages which alone it was the declared intention of these statutes to confirm, and which are so clearly specified by the Legislature: and with respect to the argument that these statutes afford any indication of the policy or intention on the part of the Legislature to give validity to marriages such as that in question, it appears to me that the inference is the other way. By the provisions for the validity of marriages solemnized "*within the British lines,*" or "*on board a British vessel of war on any foreign station, in the presence of the officer commanding such vessel,*" all persons engaged in the military or naval service, and marrying in such place, were (amongst others) exempted from the operation of the general marriage law, and acquired greater facilities for contracting marriage; and it is difficult to contend that the omission of similar provisions for the case of soldiers, while conveyed on board a transport ship from one British port to another (a circumstance of such frequent and notorious occurrence), can be accounted for as a "*casus omissus*" in the Act, or arose from any other cause than that it was not the intention of the Legislature to exempt persons marrying under such circumstances from the operation of the general law, or to give greater facilities to their marriages than to the marriages of any other individuals.

Defendant's Counsel have also relied on numerous decided cases, in which marriages had under very peculiar circumstances, and without the intervention of a clergyman in holy orders, were nevertheless held to be valid. Some of these were cases of colonists residing in remote countries, where no clergyman could be procured; and it was considered that the marriages should be held good, by reason of the necessity of the case. These authorities have been fully discussed in the argument; and it is unnecessary for me

to refer to them again in detail; it is enough for me to say that the circumstances of the present case are different from those of the cases relied on. Soldiers on board a transport ship going from Cork to Sydney are not to be considered as colonists, or as in a situation similar to that of persons cast upon a desert island; and the circumstances under which this marriage was held are not such as to warrant us in holding it valid upon the plea of necessity. If the parties in this case were to be considered as exempted from the general law of marriage, what limits could with any certainty be put to the application of this principle of exemption? Defendant's Counsel admit it should not apply to a vessel going from this country to any port in Europe; but if we admit the exemption in the present case, I do not see why it would not apply also to the case of a vessel going from this country to Gibraltar or to Malta. I have therefore come to the conclusion that the marriage of 1817 was not valid, according to the law of this country, and that therefore the plaintiffs, as the children of the subsequent marriage of 1825, are the heirs-at-law of Major Druitt.

Mr. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

HAYES, J.

I confess that I am not one of those persons who think it right or necessary that the Judge of a Court of Justice should indulge in curious or cavilling criticism with respect to the decisions of the tribunal of last resort; and when the House of Lords has spoken clearly and distinctly upon any point, it becomes us, in a fair and honest spirit, to administer the law so announced, and to leave it to the Legislature to make such corrections and amendments as may be thought right. Acting therefore on this principle, I am not disposed to say that we should not give its full weight to the decision in the case of *The Queen v. Millis*. That decision I take to be this, that, in every country governed by the Common Law of England, and without reference to the statutory provisions which may there be in force, the presence of a person in holy orders is necessary, in order to constitute a valid marriage. Now, on the part of the defendant it has been said that, although we may admit this as a

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

general principle, still it is open to qualifications and exceptions. With great deference for the learned Counsel, I think that this principle is no more open to exceptions than any other principle of law with which we have to deal. Possibly cases may occur where we may apply the maxim that "necessity will justify what necessity has required;" but still I am by no means sure that we can apply that maxim to a case of marriage at all. None of the statutes cited at all help the case of the defendant. The statute 57 G. 3, c. 51, announces that the law, as laid down in the case of *The Queen v. Millis*, prevails in Newfoundland; and when it speaks of marriages had under circumstances "of peculiar and extreme difficulty," it guardedly makes provision as to such cases, by requiring that those circumstances, and the actual contract of marriage, shall be certified on oath to the Magistrate nearest the residence of the parties as there set forth. Acting then in the spirit of this enactment, I am disposed to say that all such cases should be left to be dealt with by the Legislature, rather than that Courts of Law should take on themselves to introduce exceptions and qualifications. But, even upon the assumption that a case of necessity ought to operate as an exception to the principle involved in the case of *The Queen v. Millis*, I emphatically say that this is not a case of such necessity. The facts are these:—On the 28th of March 1817, a transport ship sailed from Cork, bound for New South Wales, with troops of the 48th regiment on board; and when the ship had been about three days at sea, and was out of sight of land, a young woman, who had concealed herself on board, is brought on deck from some place below. It is said that an attachment had existed between her and Terence Burns, a private soldier of the 48th regiment. Accordingly, without more ado, and with what I would say was very indecent haste, the marriage in controversy was celebrated. So far from necessity governing in this case, the whole matter appears to me to be a most unbecoming desecration of a very solemn ordinance. The parties are placed together, and the shipmaster acts the part of a clergyman, by reading the form of the solemnization of matrimony, as taken from the book of Common Prayer. Major Drutt, acting as clerk, reads the

responses; and in this manner the private soldier Terence Burns is married to the young woman Margaret Lynch. No more is heard of them for some four months, until they arrive in Australia; and at the end of that time, that same Major Drutt (as we are told), who, under the pressure of a strong necessity, and for the advancement of morality, took so principal a part in the performance (I will not call it solemnization) of that ordinance, is the person who takes this very young woman from her husband, and keeps her as his concubine. I confess I felt indignant when I heard this put forward as a case of necessity. I call it, as I said before, a highly unbecoming desecration of a very solemn ceremony. It is said that it was impossible to obtain the aid of a clergyman. Why we know that no vessel, voyaging in those times or in these times, ever made the passage to Sidney without touching at one, two, or more ports of call, such as the Cape of Good Hope or the Island of Ascension. Could the matter not have remained over for that period of time? In truth, the ceremony has been performed under circumstances which give it in my mind the character of a military jest or frolic, rather than of a solemn ordinance. I repudiate it as a case of necessity. It shows upon the evidence none of the attributes which belong to a case of necessity. I need not refer to the comments which have been so ably and fully made by the LORD CHIEF JUSTICE and by my Brother O'BRIEN, on the statutes which were cited during the argument. Every one of those statutes appears to me to be confirmatory of the case of the plaintiffs, rather than of that of the defendant; and I am of opinion that the verdict obtained by the defendant must be turned into a verdict for the plaintiffs.

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DRUITT.

FITZGERALD, J.

I concur in the opinion expressed by the other Members of the Court, that this marriage, by consent, on board the transport ship *Matilda*, in the year 1817, was not legal and valid so as to avoid the subsequent marriage duly solemnized in the year 1825, and bastardize its issue.

When I heard the case opened, I was led to infer that there was some statutable exception, applicable to the marriage of 1817, which



M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

distinguished this case from ordinary marriages. There is however no statute making an exception in its favor; and any inference to be drawn from the statutes on this subject tends strongly the other way. The circumstances under which the marriage of 1817 took place cannot possibly advance it beyond a contract in words of the present tense. I put aside altogether the ceremony of the reading of the words from the book of Common Prayer as being of no weight. The marriage was what is known as a consensual marriage, and nothing more. Some observations were made with a view to take this case out of the decision in *The Queen v. Millis*. Now I apprehend that *The Queen v. Millis* has done two things which are now placed beyond our control; first, it has exploded the doctrine propounded by Sir W. Scott in the case of *Dalrymple v. Dalrymple*; and secondly, has established that at Common Law a marriage is not valid unless entered into in the presence of an ordained clergyman. That being the general municipal law of England, then if the marriage of 1817 was valid, its validity must arise from some statutable exception, or from what has been called in argument, the "doctrine of necessity," that is, that from the position of the parties, a compliance with so much of the law as required the presence of a clergyman was not practicable. Amongst the statutes which were referred to, the 4 G. 4, c. 91, appeared to be the only statute which bore with any apparent directness upon this case. It was argued at the Bar that, by virtue of an exception in that Act, the marriage of 1817 was rendered valid. On referring to the Act, I find that it was passed "to relieve the minds of all his Majesty's subjects from any doubt concerning the validity of marriages," &c. "and from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad." Now these are the very terms used in the Act; and the Counsel for the defendant felt himself so hardly pressed, that he had the boldness to argue that the circumstances brought the marriage of 1817 within these terms. He contended that this regiment, while in the actual prosecution of its voyage from Cork

to Sydney, formed part of "a British army serving abroad," and that the limits of the ship formed the "British lines." But I have only to refer to the Act itself, and it is explained by the course adopted in the *Waldegrave Peerage case*. Mr. *Shelford's* work on the *Law of Divorce* contains a convenient summary not only of the Acts stated at the Bar, but also of the Acts and Orders in Council which regulate marriages, solemnized in the colonial possessions of Great Britain, from which may be deduced persuasive arguments leading to the inference that, according to the law of England, the marriage of 1817 was not valid.

Upon other grounds, and assuming that the Court was not convinced that the marriage of 1817 came within the statutes cited, the Counsel for the defendant contended that the Common Law of this country is so flexible that it is in force amongst British subjects who have left this country, even for a temporary purpose, only so far as it is capable of being performed; and that, if its requirements cannot be observed, such persons are, on the ground of necessity, absolved from carrying out its directions. We were referred to some authorities which, adopting the doctrines laid down in the case of *Dalrymple v. Dalrymple*, established, as it was said, that in the case of a marriage between subjects of Great Britain in the British colonies, the English law of marriage did not apply; at least did not apply so far as to render necessary the presence of a clergyman at a marriage, when it was difficult or impossible to obtain a clergyman. We were pressed by the case of *Maclelan v. Crystall*, in which Sir Erskine Perry held, that "that portion of the Common Law, requiring the presence of an ordained minister at a marriage, was never introduced, and does not now exist, in India." It is not necessary for us to determine whether that case was decided well or otherwise, or to offer any opinion on that case, or any other case conversant only with the law of marriage in the colonial possessions of Great Britain. I can well understand that the municipal law of England may not prevail in its integrity in newly-formed colonies, but yet such a doctrine would be wholly inapplicable to the present case. During the argument, I asked whether it had been ever decided that a marriage was valid

M. T. 1860.  
*Queen's Bench*  
 DU MOULIN  
 v.  
 DEUITT.

M. T. 1860.  
*Queen's Bench*

DU MOULIN  
v.

DRUITT.

which took place, in the absence of a clergyman, on board a British ship proceeding from any port of the British Islands to one of the British possessions, either with emigrants or with troops? The answer was, that no such case could be found. Well then, uninstructed as I was in this question, and not well versed in Ecclesiastical Law, and deriving my information on the subject chiefly from the cases of *The Queen v. Millis* and *Beamish v. Beamish*, I thought that question important, and that the negative answer was strongly against the defendant. For, when we reflect that there is nothing peculiar in the character and position of a soldier to give him greater civil rights than any other citizen—and bearing in mind that for two centuries past England has possessed a great and a rapidly increasing colonial empire—it seemed to me very strange that no one case had arisen in which it had been contended that such a marriage was valid. No such case has arisen; and that circumstance seems to afford a very strong argument against the defendant. Having called attention to these colonial cases, the Counsel for the defendant proceeded to argue that the doctrine to be deduced from them is applicable to the present case. Assuming that the Common Law is as it was stated to be, the learned Counsel went on to argue that it had ceased to be applicable to the persons on board the transport ship “*Matilda*,” so far as it was not practicable for them to fulfil its requirements. If we do not find that proposition decided in any case, or established by any authority, that exception to the Common Law must be grafted on it by the House of Lords in the first instance; we have no authority to do so. But what was the necessity in this case? Where did it begin, and what was its line? The vessel was a British vessel, sailing from a British port, commanded by a lieutenant of the royal navy, manned by British sailors, carrying British troops, and on board of which British Law in all its integrity was to be administered in civil as well as in criminal matters: it bound civil rights, and would equally apply to criminal offences. Where then was the necessity for the celebration of this marriage without the presence of an ordained clergyman? I do not feel exactly as my Brother HAYES has expressed himself, with reference to the circumstance of the

marriage of 1817, for I can quite well understand that, for the purposes of morality, the officers may have deemed it right to celebrate a marriage which might afterwards be rendered complete when the parties arrived at their destination. But where was the necessity? If the vessel had been sailing from Cork to Gibraltar, instead of to New South Wales, she would have been going on a voyage of perhaps a fortnight's duration: but still would have been going to a British port. Where is the distinction between the cases? The only difference between the case which actually occurred, and that which I have supposed, consists in the length of the voyage; and the plea of necessity would apply in the one case as well as in the other. There was nothing in the position of the parties to absolve them from compliance with the provisions of the law; we are therefore to deal with this case on the authority of *The Queen v. Millis*. Acting on the authority of that case, we have come to the conclusion that, although according to Ecclesiastical Law, the consensual marriage of 1817 may have had force for certain purposes, yet that by the Common Law it was invalid, and cannot affect the subsequent marriage of 1825. The plaintiffs have established their legitimacy, and are entitled to have the verdict, which was had for the defendant, turned into a verdict for themselves.

Cause shown disallowed.

M. T. 1860.  
*Queen's Bench*  
DU MOULIN  
v.  
DRIITT.

J. J. MURPHY v. CORNELIUS DALY.

T. T. 1860.  
May 7.  
M. T. 1860.  
Nov. 10.

THIS action was brought in pursuance of an order made by the Master of the Rolls, on the 27th April 1857, whereby his Honor Meadow land, which has not been broken up during the twenty years which immediately preceded the execution of a lease, is, as between lessor and lessee, *ancient meadow*, the breaking up of which during the term amounts to a breach of the lessee's covenant not to commit waste.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.—[LEFROY, C. J., and O'BRIEN, J.; HAYES, J., *dissentiente*. FITZGERALD, J., *absente*.]

T. T. 1860.  
*Queen's Bench*

MURPHY  
v.

DALY.

made absolute a conditional order for an injunction to restrain the defendant from breaking up the lands demised to him by a lease bearing date on the 1st May 1851; and further directed that J. J. Murphy, Esq., the Master in the cause and the grantor in that lease, should bring an action against the lessee (the now defendant), in order to ascertain the rights of the parties.

The writ of summons and plaint issued on the 28th of January 1859; and the first paragraph stated that:—The plaintiff, by a certain indenture of lease, demised to the defendant that part of the lands of Ballyderoon, called the “Fern,” . . . to hold the same, with the appurtenances, from the 1st day of May 1851, for the term of seven years, pending the several matters and cause therein mentioned. The paragraph then set forth the defendant’s covenants in the lease, viz.: to manage and cultivate in a proper and husband-like manner; and that he “should not, during the said term, “commit or suffer any wilful or voluntary waste to be committed “on said demised premises or any part thereof;” and to repair, and keep in repair, and deliver up in good order, the demised premises. The paragraph then alleged a breach of the covenant to manage and cultivate in a proper and husbandlike manner.

The second paragraph stated:—“That since the making of the “said indenture, and during the continuance of the term thereby “granted, to wit, on divers days and times between the 1st day of “December 1856, and the 1st day of March 1857, the defendant “committed waste on said demised premises, by ploughing and “breaking up *ancient* meadow and pasture, and converting same “into arable and tillage, contrary to his covenant in that behalf.”

There was a third paragraph, which alleged a breach of the covenant to repair.

Plea to the second paragraph:—“That the premises ploughed “and broken up by the defendant were not *ancient* meadow and “pasture; and that converting said land into arable and tillage “land was not contrary to the covenant of the defendant in that “behalf.”

On this plea the third issue was knit. That issue was:—

Whether the lands ploughed up by the defendant, or any of them, were *ancient* meadow and pasture; and whether the converting of said lands into arable and tillage lands was contrary to the defendant's covenant not to commit waste?

T. T. 1860.  
*Queen's Bench*  
**MURPHY**  
 v.  
**DALY.**

The action was tried before LEFROY, C. J., at the Sittings after Hilary Term 1860. A map, and the evidence of the plaintiff's witnesses (some of whom had known the lands for thirty, and some for fifty years), showed that the lands, being situate at the confluence of the rivers Araglin and Blackwater, are subject to floods, and had always, so long as they could remember, been in pasture, until the defendant broke them up, early in the year 1857; in the month of September of which year a flood washed away some of the mould, and left the potatoes, then growing there, exposed to view; that, when the defendant gave up the lands, a great part of the surface soil had been washed away; and that, considering the situation of the lands, it was decidedly bad husbandry to plough them up.

The defendant deposed that he had meadowed the lands till the spring of 1857, when the meadow became so bad that he let the land for potato gardens, *to improve it*; and that he thought it good husbandry to break up the lands, because he intended to sow grass seeds in them. The defendant and his witnesses, however, admitted, upon cross-examination, that the lands had been injured by the loss of some of the surface soil carried away by the flood; and some of the witnesses deposed that the lands in question, or part of them, had been tilled about thirty-five years before.

The LORD CHIEF JUSTICE, in his charge, left the case to the jury to find a verdict upon the several issues according to their view of the evidence, except as to the issue above stated. Upon that issue he told the jury that the land ploughed up within living memory was not, in point of law, *ancient* pasture; and, upon that ground, directed them to find a verdict for the defendant upon the third issue. Thereupon, Counsel for the plaintiff called upon the LORD CHIEF JUSTICE to inform the jury that, if they believed the evidence, the land, not having been broken up for thirty-five years,

T. T. 1860. *was ancient* pasture, and to direct a verdict for the plaintiff on that issue. Counsel cited *Morris v. Morris* (a).

*Queen's Bench*

MURPHY

v.

DALY.

The LORD CHIEF JUSTICE refused so to direct the jury, but reserved the point for the consideration of the Court above.

The jury found a verdict for the defendant on all the issues.

Serjeant *Fitzgibbon*, on a former day, obtained a conditional order to set aside the verdict, upon the grounds that it was against the weight of evidence, and that the LORD CHIEF JUSTICE had misdirected the jury upon the issue above stated.

Against that conditional order—

The *Solicitor-General* (*T. O'Hagan*), with whom was *J. S. Greene*, now showed cause.

As to the objection that the verdict was against the weight of evidence, he contended that the jury could scarcely have found a verdict for the plaintiff, even upon the evidence adduced by himself; and, as to the alleged misdirection, argued that the defendant's acts were lawful, as he had not entered into any covenant not to break up the land; and did not amount to waste, because the lands had been in tillage within living memory, and prior to the date of the defendant's lease. Such lands are not *ancient* meadow or pasture: *Martin v. Coggan* (b). The case of *Morris v. Morris* (c) cannot establish the plaintiff's proposition, because it appears from the judgment that "it is admitted, as between landlord and tenant, this is tillage land." In *Barret v. Barret* (d), Richardson, C. J., said:—"The law will not allow that to be waste which is not any ways prejudicial to the inheritance." That principle was carried farther in *Doe d. Grubb v. The Earl of Burlington* (e). And, in the old case of *Tresham v. Lambe* (f) "the judges would not "grant any writ of estrepement to the pasture, for that it was ridge "and furrow, and it was no *ancient* meadow, although that had "been mowed *time out of mind*." Counsel also cited *Lurting v.*

(a) 1 Hog. 238.

(b) 1 Hog. 120.

(c) *Ubi supra*.

(d) *Hetley's Rep.* 35.

(e) 5 B & Ad. 507.

(f) *Brownlow & Gold's Rep.*, pt. 2, p. 46.

*Conn* (a); 2 *Rolle's Abr.*, p. 815, pl. 8; and *Wood's Institutes*, T. T. 1860. bk. 2, p. 306.

*Queen's Bench*

MURPHY

v.

DALY.

Serjeant *Fitz Gibbon* and *Frazer*, *contra*, relied strongly on the map, which showed that the lands were situated at the confluence of two rivers, and therefore subject to great and inevitable damage from floods. Counsel also contended that the evidence, when taken in the view most favorable to the defendant, only proved that the lands had been in tillage about twenty-five years prior to the date of the defendant's lease, but not since that period. Therefore this case comes within the principle, established by the authorities, that in fee-simple estates the land, if it has not been broken up during the twenty years which immediately precede the commencement of the tenancy, has, as between the lessor and lessee, acquired the character of *ancient* pasture: *Morris v. Morris*; *Goring v. Goring* (b); *Simmons v. Norton* (c); *Creagh v. Carmichael* (d). *Tresham v. Lambe* does not establish the proposition that land is *not ancient* pasture, even though it has remained unbroken for twenty consecutive years immediately preceding the commencement of the tenancy; but merely that land, which is sometimes in tillage and sometimes in pasture, cannot be considered *ancient* pasture. If the varying period of living memory be adopted as the test of what is *ancient* pasture, the most unfortunate results will follow; for longevity varies much in different districts, so that the period of time which in one district will constitute land *ancient* pasture, will be inadequate for that purpose elsewhere. The vague and varying nature of this test, and the uncertainty incidental to its application, afford strong grounds to question its soundness, and bring it within the mischief pointed out in the aphorism of Bacon: "*Misera servitus est, ubi jus est vagum, aut incognitum.*" Moreover, *ancient* pasture was particularly favored by the common law, and the Court ought to uphold the old law. "If the tenant convert meadow into "arable, it is waste; for it changeth, not only the course of his "husbandry, but the proof of his evidence."—*Co. Lit.*, 53 b.

(a) 1 Ir. Ch. Rep. 273.

(b) 3 Swans. 661.

(c) 7 Bing, 640.

(d) 7 Ir. Eq. Rep. 334.



T. T. 1860.  
Queen's Bench

MURPHY  
v.  
DALY.

*Greene*, in reply.

The cases cited for the plaintiff only prove that the continuance of land in pasture for twenty years is *prima facie* evidence sufficient to induce a Court of Equity to grant an injunction, until the rights of the parties can be settled by law. But it never has been decided that the character of *ancient* pasture is impressed on land simply because of its continuance in pasture for such a period. On the contrary, land, which has ever been turned up, has lost that character (a). In *Tresham v. Lambe*, the appearance of furrows on the land was held evidence sufficient to show that the lands could not be *ancient* meadow, because the presence of those marks showed that the lands had at some previous time been in tillage. The averment in support of such a claim must be "of meadow or pasture, *time out of mind*:" *Gunning v. Gunning* (b). In the present case, the lands were tilled within living memory. The jury have found that the acts of the defendant were according to the course of good husbandry. Those acts, then, cannot have injured the inheritance, and therefore do not amount to waste: *Doe v. The Earl of Burlington* (c). It is a mistake to suppose that *ancient* pasture was particularly favored by the common law: *Tyringham's case* (d). At common law an action for waste would not lie against a lessee for life or years, because it was laches in the lessor not to provide by covenant against the doing of waste (e). The owner of the immediate estate of inheritance was the only person entitled, by the common law, to bring an action of waste (f). Therefore the damage which the law intended to prevent was such a conversion of the lands as destroyed the evidence of title, and injured the inheritance, by changing the appearance and character of the land. For that reason, a prohibition of waste lay, at common law, against the tenant, by the curtesy, tenant in dower, and guardian in chivalry; but not against the lessee for life or years, as

(a) 2 Rol. Abr. 815.

(b) 2 Show, 8.

(c) *Ubi supra*.

(d) 4 Rep. 36 a; S. C., Tudor's L. Cas. 73.

(e) 2 Inst. 145, 299; 5 Rep. 13 b; Co. Lit. 53 a.

(f) Co. Lit. 53 b.

the lessor might have provided against his acts. *Tyringham's case* shows that the policy of the common law was to promote agriculture, as being one of the greatest commodities of the realm. That policy is still more applicable to the present time.

T. T. 1860.  
*Queen's Bench*  
MURPHY  
v.  
DALY.

Counsel also cited *Vin. Abr.*, tit. *Waste*, D. 6, and *Com. Dig.* tit. *Waste*, D. 4.

*Cur. ad. vult.*

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HAYES, J.

This was an action, in the nature of an action of covenant, by the lessor Master Murphy, against the defendant the lessee. The plaint sets forth a lease of that part of the lands of Ballyderoon called "Ferin," to hold from the 1st of May 1851, for seven years, pending several matters and a cause. It then sets out a covenant by the lessee, to the effect (among other things) that he would not, during said term, commit or suffer any wilful or voluntary waste to be committed on said premises, or any part thereof. It then avers, by way of breach, that, since the making of the indenture, the defendant committed waste on the said demised premises, by ploughing and breaking up *ancient meadow and pasture*, and converting the same into arable and tillage, contrary to his covenant in that behalf. To this the defendant in his plea says, that the premises ploughed and broken up by him were not "ancient meadow and pasture;" and that converting the said lands into arable and tillage lands was not contrary to the covenant of the defendant in that behalf. Issue having been joined upon this plea, with others which it is unnecessary here more particularly to refer to, the case went down for trial before my LORD CHIEF JUSTICE, at the Sittings after Hilary Term 1860, when it appeared in evidence that the defendant having entered into possession of the lands under the lease, he, in the spring of 1857, and towards the close of the term, ploughed and put a crop of potatoes into a portion of the land that lay on the bank of the river Blackwater, and which had been used for many years as meadow and pasture, not having been turned up since about the year 1825, twenty-six years before the making of the lease. It is for this act of the tenant that the present action

M. T. 1860.  
Nov. 10.

M. T. 1860.  
*Queen's Bench*  
**MURPHY**  
*v.*  
**DALY.**

has been brought. Witnesses were examined on both sides at the trial, some of whom swore that they had known the land for a long series of years, during which period they had never known it to have been broken up; while, on the other hand, witnesses called for the defendant proved that it had been broken about the time I have mentioned. In leaving the case to the jury, the LORD CHIEF JUSTICE told them that it was not to be deemed "ancient meadow" if it could be shown to have been broken *during living memory*. The jury found a verdict for the defendant on the issue I have mentioned; and the plaintiff having obtained a conditional order to set aside the verdict for this alleged misdirection of the learned LORD CHIEF JUSTICE, the case now comes before us to decide on the correctness of this ruling, and thus virtually to affirm that a lessee for years, having entered into such a covenant, shall nevertheless be permitted, in a Court of Law, to break up meadow land; provided there be at the time a living witness of the previous breaking of the soil. Other issues were sent to the jury upon other matters in controversy; and the conditional order has been granted, not only on the ground of misdirection, but because the verdict was against the weight of evidence. Upon this latter ground, suffice it to say that, I am of opinion the verdict had ought not to be disturbed. I therefore pass to the consideration of the other question in the case.

Since the days of Hobart and Lord Coke, aye and for centuries before, it has never been disputed that, in a Court of Law, the conversion of "meadow" into arable land is waste (*Hob.*, p. 234); and the reasons assigned (*Co. Lit.*, 53) are, that "it changeth "not only the course of the tenant's husbandry, but the proofe of "his evidence." This latter reason Chief Justice Tindal, in *Simmons v. Norton* (a), says, "I am not disposed to treat lightly. In "grants, land often passes specifically as meadow, pasture, arable, or "by other descriptions; and I am not prepared to say that alteration of the surface might not produce a difficulty in the title." Ploughing meadow land (he proceeds to say) "is also esteemed "waste, on another account, viz., that, in ancient meadow, years,

(a) 7 Bing. 640, 647.

"perhaps ages, must elapse, before the sod can be restored to the state in which it was before ploughing." I am not quite sure that modern agriculturalists will feel disposed to give to this reason all the weight which our ancestors may have done, and which Chief Justice Tindal seems to think it entitled to. But, be that as it may, this is the rule, and these are the reasons for it; and our present business is to inquire into the exact meaning of the word "meadow," which occurs in it, or "ancient meadow," as Chief Justice Tindal interprets it, and which expression occurs in the plaint and plea.

M. T. 1860.  
*Queen's Bench*  
 MURPHY  
 v.  
 DALY.

The case of *Tresham v. Lambe*, which was decided so far back as the 8 Jac. 1, and is reported in 2 Br. & G., p. 46, has been cited in support of the position laid down by the LORD CHIEF JUSTICE. I do not find this case in any cotemporary reporter; but, as it is referred to as an authority, in 2 Roll. Abr., p. 814, pl. 6, and Vin. Abr., tit. *Waste*, D, pl. 6, I shall state it from the reporters. The plaintiff having brought his action of waste against the defendant, for ploughing up ancient meadow, prayed the Court, pending the action, for its judicial writ of estrepement, upon the Statute of Glo'ster, c. 13, to stay the alleged waste. Upon examination, it appeared that the land demised was pasture and meadow; that the land known as pasture had been mowed (as it is said in one part of the report) "for diverse years," and in another part, "for time out of mind;" but was then in ridge and furrow; plainly showing that at some former period it had been subjected to cultivation, though perhaps not within living memory. This last circumstance, viz., the existence of ridge and furrow, was deemed sufficient to warrant the Court in refusing the writ, as to the pasture, though it was granted as to the meadow. "The Judges," say the reporters, "would not grant any estrepement as to the pasture, for that it was ridge and furrow; and it was no ancient meadow, although it had been mowed time of mind:" thus deciding, as I apprehend, that land is not to be deemed "ancient meadow," though there be no living witness of its cultivation, if, nevertheless, the surface of the ground present indications of its having been cultivated at some remote era, perhaps long antecedent

M. T. 1860.  
*Queen's Bench*

MURPHY

v.

KELLY.

to the period of living memory. With all deference to the wisdom of our ancestors, and the proof of it given to us by those reporters, I cannot assent to that position. It proves far too much. In order to sustain the rule, as quoted from *Lord Coke*, and the reasons for it, all that is requisite is, to give evidence of an antiquity sufficient for all the purposes of title and husbandry. Nor is it necessary, in order to sustain the view put forward by the LORD CHIEF JUSTICE at the trial, to push the principle to such an extent as has been done in this case. It is also to be observed that when the case of *Tresham v. Lambe* is cited by *Rolle* and by *Viner*, it is only in support of the statements that, "If an ancient meadow, which has been meadow time out of mind, be converted into arable land, it is waste." And again—"If meadow be sometimes arable, and sometimes meadow, "and sometimes pasture, there, the ploughing of it is not waste." To these affirmative propositions I give my full assent; but they are far from identical with what is sought now to be established negatively, viz., that meadow shall not be deemed ancient meadow, so as to give it protection in a Court of Law, under a covenant against waste, unless it have been meadow time out of mind.

Let me now draw attention to an *Anonymous case* of earlier date, and to be found in 2 *Leon.*, p. 174. It is there laid down, by Windham and Rhodes, JJ., of the Common Pleas, that, "If a "termor converteth a meadow into a hop garden, the same is not "waste, for it is employed to a greater profit, and it may be a "meadow again." This case does not appear to have been cited in *Tresham v. Lambe*; and, if it had, the Judges there might possibly have hesitated, before they laid down the position in the very wide terms attributed to them by the reporters.

The next case is *Gunning v. Gunning (a)*. That was an action of waste. The declaration was for ploughing up pasture land, and so making waste. The defendant denied that any waste had been committed. On the trial, the jury found that the defendant "had committed waste in manner and form as alleged in the count." It was moved in arrest of judgment, because the plaintiff had not alleged a waste done, but left it absolutely uncertain, and *non*

(a) 2 Show, 8.

*constat*, to the Court, that what the defendant had done was waste; and that this was not helped by the verdict, which only says that the defendant did it *modo et forma*, as in the count. It is said by Counsel, in argument, that to make the ploughing of pasture amount to waste, "it ought to have been pasture time out of mind; and it is not enough to say that this was pasture ground *diu ante*." Now, though we should admit that the case of pasture land is analogous to that of meadow, still this was only the argument of Counsel, and of no weight as an authority. The Court arrested the judgment, Mr. Justice Jones saying that, "arable and pasture ground are convertible; and that which is one of them this year may be the other the next; and the law does not so much distinguish." This is the whole case. The judgment was stayed; the Court thus holding, as I take it, that the expression "ploughing up pasture land," as used in the declaration, was vague and uncertain, and did not *per se* mean "ancient pasture;" but withholding any opinion as to what constituted ancient pasture.

M. T. 1860.  
*Queen's Bench*  
 MURPHY  
 v.  
 DALY.

I have now gone through all the cases bearing on this point which I have found to be decided by Courts of Law, and I confess that, in my judgment, they afford no sufficient warrant for the inference that is sought to be drawn on the part of the defendant here—viz., that land is not to be deemed ancient meadow, and within the rule I have referred to, so long as there exists a living witness of its previous cultivation.

In default then of legal authorities, let us turn to the cases in Equity, and examine them from the earliest period, when the legal writ of estrepement began to give way to the more convenient application to a Court of Equity for an injunction in the nature of a writ of estrepement—with a view to ascertain what the Judges there have said and done, while administering an equitable remedy for what is confessedly a legal injury; and I do this with the more confidence, because I believe the question to be one really as to the construction of the covenant in the lease, and it is a familiar principle that the construction of covenants is the same in Equity as at Law: *Eaton v. Lyon* (a).

(a) 3 Ves. 692.

M. T. 1860.  
*Queen's Bench*

MURPHY

v.

DALY.

In *Atkins v. Temple* (a), which was decided about fourteen years after *Tresham v. Lambe*, the bill was filed to restrain the defendant from ploughing ancient meadow, which had not been ploughed in the memory of man. After a search for precedents, the Lord Keeper (Sir Thomas Coventry), assisted by the Judges, declared "that he did find, by divers precedents, part in the time of Lord Ellesmere, and others since, that the ploughing of ancient pasture has been restrained by decrees of this Court; and declared that in those cases, so decreed, it did not appear that the pasture restrained from ploughing were neither *so ancient*, or so rich and fertile, as in this case: and his Lordship did further declare that, whereas ploughing of meadow by the law is waste, he conceiveth that the ploughing of ancient pasture is of equal value with meadow, as no less prejudice, either to the landlord or to the commonwealth, than the ploughing of the meadow; and therefore fit to be restrained in Equity; the Judges being of the same opinion; and decreed the defendant to forbear ploughing, as aforesaid." This case, being thus decided, with the concurrence of the Common Law Judges, may be looked on—first, as having effaced the distinction between meadow and pasture land, that seemed to have been taken by Mr. Justice Jones, in *Gunning v. Gunning*; secondly, as having overruled both that case and *Tresham v. Lambe*, so far as they, or either of them, requires an antiquity from the commencement of the period of legal memory; for it declares that injunctions had been issued where the pasture was *not so ancient* as in that case. And all this is done by a Court professing to be governed, not by any peculiar doctrines of Equity, but by the ancient principles of the Common Law, so much so that, as said by Lord Redesdale, in *Calvert v. Gavin* (b), "until a Court of Law has determined on the right, it is not fit that a Court of Equity should interfere by injunction." So also in *Fermier v. Maund* (c), which was decided twelve years after *Atkins v. Temple*, the Court of Chancery would not give way to the ploughing up of ancient pasture, though it was insisted on that the nature of the ground was for tillage, *and had*

(a) 1 Rep. in Ch. 13.

(b) 2 Sch. & Lef. 562.

(c) 1 Rep. in Ch. 62.

*been formerly ploughed.* The next case, in order of time, is *Goring v. Goring* (a), which was decided in the year 1676. There Lord Nottingham lays it down that, "*In imitation of the Law*, it hath obtained that if . . . . . a lessee for years would make any considerable distinction, this Court [of Chancery] usually grants an injunction, and stays the ploughing of meadows or of ancient pastures." He goes on to say—"Here the pastures had been ploughed within six years before the lease began, and, *ergo*, though the lease have continued thirty years, during all which time the pastures have been unploughed, yet that will not make them ancient pastures within the rule of this Court; for as to the lessee himself, who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance; otherwise, if they had been so long out of lease." Thus implying that if the land had been unbroken pasture for a period of thirty years before the making of the lease, the Court of Chancery, acting in imitation of the Law, would have granted its injunction. The injunction there was refused as to the pasture lands; and from that case we may infer that whatever was the period of time during which the plaintiff (the landlord) was obliged to show that the land had continued unbroken, he was not allowed to calculate, as part of that period, the time that had elapsed since the making of the demise; and upon this principle (which, I apprehend, prevails as well at Law as in Equity), that the estate for years having been created by the act of the parties, and the lessor having taken care, on the occasion of such creation, to provide for his security by a covenant entered into by the lessee, the duty thus by the contract imposed on the lessee must be considered with reference to the circumstances which existed at the time of making the contract. The next reported case, in order of time, that I find, is one which occurred after a long interval, and in this country—I refer to *Martin v. Coggan* (b), decided by Sir William M'Mahon, M. R., in 1824. It was a motion for an injunction to restrain a tenant from ploughing up ancient pasture. The defendant admitted that the land had not previously been broken up within his knowledge, but

M. T. 1860.

Queen's Bench

MURPHY

v.

DALY.

(a) 3 Swanst. 661.

(b) 1 Hog. 120.



M. T. 1860.  
*Queen's Bench*

MURPHY  
 v.

DALY.

said that there were ancient plough marks in it, and that there was no covenant in his lease against breaking up the land, and that it was good husbandry so to do. The Master of the Rolls, in his judgment, said :—" I have often had occasion to consider this " subject. I cannot take the tenant's opinion on the propriety of " his course of husbandry, neither can I allow ancient pasture to be " broken up, though the land requires tillage. The usual form of the " affidavit required to support an application for such an injunction " is, that the land is ancient pasture or meadow, and has not been " burned nor tilled for the last twenty years. And it is for the " defendant to show that it ought not to be considered ancient " pasture, by reason of its having been used in tillage previously " to the date of his lease."

From this language I infer that the Master of the Rolls would not have much regarded *Tresham v. Lambe*, and the importance there given to the ridge and furrow marks; neither would he have been much oppressed by *Gunning v. Gunning*, and Mr. Justice Jones's observations as to pasture land being undeserving of protection.

The expressions attributed by the reporter to his Honor would seem to convey that he did not acknowledge the authority ascribed by the Lord Keeper, in *Atkins v. Temple*, to the precedents he had discovered, in which his Lordship said that injunctions had been decreed though the pasture were *not so ancient* as in the case before him; and that his Honor was of opinion that the same unvarying standard, with reference to the period of legal memory, must be applied to all, though a more convenient mode of *prima facie* proof might be, and had been adopted, in manifest analogy to the Statute of Limitations. But I question the entire accuracy of the report; for I find a very different view expressed by the same learned Judge in the following year, in the case of *Morris v. Morris (b)*. That was the case of a tenant for life and remainderman, of land held under a lease for three lives or forty-one years, and put in settlement by the will of the lessee. The remainderman sought an injunction to restrain the tenant for life from breaking up ancient meadow,

(a) 1 Hog. 238.

which was resisted by the tenant for life, on account of the nature of the interest ; but this distinction was repudiated by his Honor, who said he considered that, in fee-simple estates, a continuance in pasture for twenty years, during the life of the donor or testator, impressed on land the character of ancient pasture ; and that he had frequently acted on that principle. So, also, in the case of *Joley v. Stockley*, decided about the same time, by the same Judge (a), in an injunction suit by a landlord, to restrain waste by the tenant, an order was made to refer it to the Master to inquire whether the defendant had broken up any part of the land comprised in the lease, which was "ancient meadow" at the time the lease was executed. The plaintiff applied to have the words "or not broken up within twenty years before," added to the words of the reference ; but the Master of the Rolls refused to do so, *as that fact would be decisive upon the inquiry as directed*. What, then, are we to infer from the last two cases, but that his Honor, exercising his jurisdiction upon a legal question, decided that proof of the continuance of land in the character of meadow for a period of twenty years before the date of the lease, was not merely evidence of continuance from the period of legal memory, capable of being rebutted by contrary testimony, but, as against the tenant, was decisive of the fact whether or not it was ancient meadow ?

The only other case I find in the books, and bearing pointedly on this subject, is *Creagh v. Carmichael* (b), which came before the Court of Equity Exchequer in 1844. A landlord, who had demised land in 1842, prayed an injunction against the tenant, to restrain waste by turning up ancient meadow. The affidavit appearing to be defective, Baron Richards directed that the deponent should make an affidavit that he knew the lands for twenty years, and that they had not been broken up at any time within that period. This case, though it goes strongly to show a recognition by the learned Baron of the twenty years' standard, does not intimate an opinion whether the continuance for twenty years before the lease is to be considered decisive of the question, or only affording a *prima facie* presumption, capable of being rebutted by contrary testimony.

(a) 1 Hog. 247.

(b) 7 Ir. Eq. Rep. 334.

M. T. 1860.  
*Queen's Bench*MURPHY  
v.  
DALY.

M. T. 1860.  
*Queen's Bench*  
**MURPHY**  
*v.*  
**DALY.**

From this review of the cases, I think it will appear that there is not a single authority in a Court of Law, save the case in *Brownlow and Goldsborough*, and the dictum of Counsel in *Gunning v. Gunning*, for holding that meadow is not within the protection of the laws against waste, unless it have been meadow time out of mind. And I think the weight of that decision and dictum have been fairly overbalanced by the stream of decisions in Courts of Equity which I have referred to, all of which were made in professed obedience to legal principles, and when dealing with a writ precisely analogous to the old writ of estrepement.

It is highly probable that a fixed period may have been sought for through motives of convenience, and from a desire that men's rights should rest on some more certain and solid foundation than would be afforded by the test of what is called "living memory;" and that a period of twenty years was fixed on in analogy to the Statutes of Limitations, which have declared that a period of twenty years' adverse enjoyment of land shall be sufficient to give a title to the land, and to convert the veriest usurpation and trespass into an unquestionable right to the fee-simple and inheritance. And does it not seem to follow, almost as a consequence, that if a twenty years' possession be sufficient to obliterate all traces of former title and ownership of land, it should also suffice as well for the obliteration as creation of all rights, easements, and incidents belonging to or springing out of ownership of land?

But still it may be asked, what right have we, sitting as a Court of Law, to lay down a rule that meadow or pasture, not broken for a period of twenty years before the relation began, shall be deemed "ancient," so as to make the breaking of it to be deemed waste? I answer, that precedent, analogy, and a convenience almost amounting to necessity, are all in our favor; and that we have the same right which Courts of Law had when they held, in *Penwarden v. Ching (a)*, and other cases, that enjoyment of lights, as of right, for a period of twenty years, gives them absolute protection as ancient lights; or when they held that enjoyment of a watercourse, as of right, for a like period of twenty years, gives the party a right to it

(a) 1 Moo. & M. 400.

absolutely. In these cases, and many others of a like kind, the rule fixing the period of twenty years has been laid down by Courts of Law; and the advantageous results of a fixed and settled principle have been achieved, not by the authority of, but in analogy to, the Statute of Limitations, which has thus afforded a key for the solution of difficulties similar to those which had prompted the enactment of the statute. An instructive example of the progress of decisions by Courts of Law themselves, on a subject of this kind, may be seen in the case of *Holcroft v. Heel* (a). There, an action was brought by a person who was lawfully entitled to a market, for a disturbance of that market, by the unlawful erection of another market in its neighbourhood. At the trial, the plaintiff showed that this usurpation on his rights had existed for upwards of twenty years, and gave evidence of the precise period of its commencement. Chief Justice Eyre nonsuited the plaintiff; and upon the matters coming before the Full Court, on a motion to set aside the nonsuit, it was insisted, by Serjeant Le Blanc, on the part of the plaintiff, that the only ground on which the defendant's possession of the market for more than twenty years could defeat the plaintiff's right of action, was the presumption which it afforded of a grant; but that all such presumption had been rebutted by the proof, which was given at the trial, of the commencement of the defendant's market. The Court however intimated a decided opinion, that the undisturbed possession of the market, by the defendant, for twenty-three years, was a clear bar to the plaintiff's right of action. The same Mr. Serjeant Le Blanc, after his promotion to the Bench, has informed us, in the case of *Campbell v. Wilson* (b), that the ground on which *Holcroft v. Heel* went off was, that the Court intimated an opinion that if the case went down to trial again, upon the same facts, it would be left to the jury to find for the defendant, upon the ground of presumption of a grant after twenty years' uninterrupted user of the market; that the plaintiff's Counsel said, if it were left to the jury in that manner, with the recommendation of the Court in favor of such a presumption, it would answer no purpose to go to trial again.

M. T. 1860.  
*Queen's Bench*

MURPHY  
v.  
DALY.

(a) 1 Bos. & P. 400.

(b) 3 East, 298.

M. T. 1860.  
*Queen's Bench*

MURPHY

v.

DALY.

When things had come to this state, it would require but little discernment to foresee what would be, and what has been, the result—viz., that the period which was at first regarded as a mere ground for a rebuttable presumption by a jury, soon came, under the fostering hand of the Court, to be regarded as a positive rule of law. So also, it appears to me, that whatever may have been originally the strict legal meaning of the words “ancient meadow or pasture,” the law now is, that that shall be deemed meadow or pasture, so as to be within the protection of the law against waste, which has continued in that state for a period of twenty years before the commencement of the relation during which the injury complained of has been committed.

Upon the whole, I am of opinion that this case was not presented to the jury in the way in which it ought to have been ; and that the verdict had in conformity with the direction of the learned CHIEF JUSTICE ought to be set aside, and a new trial had. I have come to this opinion, not merely because I think that the act done by the defendant was waste in the contemplation of a Court of Law, but because I think it was in direct violation of the covenant entered into by the defendant ; and which covenant must, as I have said, receive the same construction in a Court of Law and in a Court of Equity.

O'BRIEN, J.

In this case I am of opinion that the verdict obtained by the defendant should not be set aside. With respect to one ground of objection relied on by the plaintiff, namely, that the verdict was against the weight of evidence, it is unnecessary for me to refer in detail to the evidence which was so much discussed during the argument ; and I shall only say that, considering the principles upon which Courts should act in setting aside verdicts on that ground, I do not think we should be warranted in doing so in the present instance. The other ground of objection relied on, viz., that of misdirection by my LORD CHIEF JUSTICE, with respect to the third issue, raises a question of great importance. The lease of 1851, executed to defendant by plaintiff, as Master of the Court

of Chancery, contains (amongst others) a covenant by defendant against wilful or voluntary waste; and plaintiff contended that defendant had broken this covenant, and committed "*waste*," by breaking up and tilling, in 1856 and 1857, certain portions of the demised premises, which (as plaintiff alleged) were "*ancient meadow or pasture*." Defendant gave evidence to show that the land so broken up and tilled had been previously broken up and tilled about thirty-five years before the trial (being about twenty-six years before the lease); but it also appeared by the evidence that they had been immediately afterwards laid down, and restored to the condition of meadow or pasture; and that, from thence continuously until the execution of the lease (a period of about twenty five years), they remained in that condition. The question accordingly was, whether these portions of land, by remaining in meadow or pasture for that period of twenty-five years, though they had been broken up and tilled immediately before that period, should be regarded as having acquired, at the date of the lease, the character of "*ancient meadow or pasture*," so as to render the breaking up and tilling of them an act of "*waste*" by the tenant? Considering the serious penalties annexed by the law to the commission of "*waste*" by a tenant, we should not, I think, hold the acts in question to be such, except we had clear authority for so doing. It has been urged that such acts are injurious to the land; but it is in the power of the landlord to prohibit them expressly by special covenants in the lease (even though they should not be held as within the general covenants against waste); and in the case now before us, it appeared from documents produced at the trial, that leases of other portions of the estate, made in the matter to other persons, contemporaneously with that to defendant, contained special covenants against breaking up and tilling: and that, in the previous advertisement for the letting of those other portions, it was stated that the tenants would not be allowed to do so. This circumstance should not of course influence our decision upon the legal question; but it shows how the injurious results which, it is alleged, would follow from holding the acts complained of not to be "*waste*," might be avoided. With respect to the legal

M. T. 1860.  
*Queen's Bench*  
 MURPHY  
 v.  
 DALY.

M. T. 1860.  
Queen's Bench

MURPHY

v.

DALY.

question before us, it is clear that the breaking up and tilling of "*ancient meadow or pasture*" is an act of waste. And plaintiff contends that if land let to a tenant has been in meadow or pasture for a period of twenty years or upwards previous to such letting, it thereby becomes impressed with the character of ancient meadow or pasture, though it appear that it had been broken up and tilled before that period; and that accordingly the tenant, by breaking up and tilling it, commits an act of "*waste*." We have been referred to several cases on this subject, both at law and in equity. With respect to the cases at law, none of those which have been cited establish the proposition contended for by the plaintiff; some of them, on the contrary, lead to the contrary conclusion. In *Tresham v. Lambe* (a), an action was brought by a landlord against his tenant for waste, in ploughing *ancient* meadow and pasture (which plaintiff had let to defendant for years), and sowing it with woad; and plaintiff prayed a writ of estrepement, under the Statute of Gloucester. On examination it appeared "that the lands let "were pasture and meadow; that the pasture was *ridge and furrow*, but had been mowed, and used for meadow for eleven years; "and that defendant ploughed and sowed that with woad; but that "the land which had been '*ancient*' meadow was used by defendant "as meadow, and was not converted into arable land." The Judges granted a writ of estrepement as to the ancient meadow, but refused it as to the pasture, "for that it was ridge and furrow; and it was "no *ancient* meadow, though that had been mowed time out of "mind." It is true that one of the Judges (Foster, J.) thought that the writ should also be granted as to the pasture, on the ground that "the sowing of *woad* was against common right, and the smell offensive," &c.; but he expressly stated that he would have agreed with the other Judges, as above, if it had been the sowing of corn. We have therefore the unanimous opinion of the Judges in that case that, if land be "*ridge and furrow*" (which shows that it had been broken up and tilled at some previous time), it is not to be considered as "*ancient meadow*," though it has been mowed for time out of mind; and this decision applies

(a) 2 Br. & G. 46; 8 Jac. 1.

directly to the question now before us. The authority of *Tresham v. Lambe* has indeed been impugned by plaintiff's Counsel; but it has not been overruled or questioned in any subsequent case at law; on the contrary, it has been referred to, and its principle adopted in subsequent treatises of high authority. In 2 *Roll. Abr.*, under the title "What act shall be waste," it is stated (p. 814, *pl.* 6), "If an ancient meadow, which has been meadow time out of mind, *come brook meadow*, be converted into arable, that is "waste," (and for this the case of *Tresham v. Lambe*, 8 *Jac.* 1, is cited). Again (p. 815, *pl.* 7), *Rolle* states, "But if meadow be sometimes arable and sometimes meadow, and sometimes pasture, then "the tilling of that is not waste." In this latter statement, *Rolle* appears to have adopted the principle of the decision in *Tresham v. Lambe*, as to the effect of land being "ridge and furrow." Again, in 23 *Vin. Abr.* (published in 1745), p. 437, tit. *Waste*, D, we find the case of *Tresham v. Lambe* cited as an authority, not merely for the proposition (*pl.* 6) "that, if an *ancient meadow*, which has "been meadow time out of mind, as brook meadow, be converted "into arable land, it is waste;" but also for the further proposition (*pl.* 7), which is in these words:—"But if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, then "the ploughing of it is *not* waste." I see no ground therefore for considering the case of *Tresham v. Lambe* as one which we should not follow. In *Cruise's Digest*, vol. 6, tit. *Waste*, D, 4, it is stated that it is not waste in a tenant to convert pasture to arable, where the land is sometimes pasture and sometimes arable. We have been also referred by defendant's Counsel to the case of *Gunning v. Gunning* (a). That was an action for waste; the declaration stated that defendant ploughed up plaintiff's land, which was pasturable, "*et sic vastum fecit*;" defendant pleaded "no waste *modo et forma*;" and, after verdict for plaintiff, defendant's Counsel moved to arrest the judgment, on the ground that the ploughing of pasture may be, or may not be, waste; and that to make it such, it ought to have been pasture time out of mind, and that it was not enough to say that same was pasture "*diu ante*." The judg-

M. T. 1860.  
Queen's Bench  
MURPHY  
v.  
DALY.

(a) 2 Show. 8.



M. T. 1860.  
*Queen's Bench*

MURPHY  
 v.  
 DALY.

ment was arrested accordingly; Jones, J., stating—"Arable and  
 "pasture ground are convertible terms; and that which is one  
 "of them this year, may be the other the next; and the law does  
 "not so much distinguish." This case is not certainly a decision  
 on the question now before us; as Jones, J., in his judgment did  
 not exactly adopt the proposition of defendant's Counsel, that the  
 land should have been pasture time out of mind; but he does not  
 suggest any other rule or principle for determining that the con-  
 version of pasture land into arable was waste, except that contended  
 for by defendant's Counsel, namely, that it should have been pasture  
 "time out of mind." The case of *Simmons v. Norton (a)* was  
 relied on by plaintiff's Counsel; but in that case no question what-  
 ever arose similar to that now before us. Tindal, C. J., states, in  
 one part of his judgment (p. 647), the general proposition that the  
 ploughing of meadow land is waste; but by this he clearly intended  
 "*ancient meadow*." He uses that expression immediately afterwards,  
 in stating some of the reasons why the ploughing of meadow should  
 be considered waste, namely, "that, in ancient meadow, years, per-  
 "haps ages, must elapse before the land could be restored to the  
 "state in which it was before ploughing;" and there is not in his  
 judgment any indication of opinion that land should be considered  
 as "*ancient meadow*," if it had remained in the condition of meadow  
 for any particular number of years. We have also been referred  
 to the cases of *Malverin v. Spike (b)* and *Lord D'Arcy v. Ash-*  
*with (c)*, in both of which the proposition is stated generally, by  
 the Judges, that the conversion of meadow into arable land was  
*waste*; but it is clear, from all the authorities, that the proposition  
 to that extent cannot be sustained, and that it must be considered as  
 restricted to the case of "*ancient meadow*," whatever be the rule as  
 to the length of time after which land would acquire that character.

It has been also urged on us, during the argument, that by analogy  
 to the Statute of Limitations, and also by analogy to the rule of law,  
 by which (even before the Prescription Act) twenty years' enjoy-  
 ment of incorporeal hereditaments or easements, such as rights of

(a) 7 Bing. 640.

(b) 1 Dyer 33.

(c) Hob. 234.

way, was considered as giving title thereto—we should also hold, that if land, let to a tenant, had been in meadow or pasture for twenty years before the letting, then it should be considered as impressed with the character of ancient meadow or pasture. I think, however, the cases are very different; the limitation of twenty years' possession as the period to confer or defeat title to land was expressly fixed by statute. And with respect to incorporeal hereditaments and easements, such as rights of way, lights, &c.,—an enjoyment of them for twenty years was held, under certain circumstances, to confer title, upon the ground that what was done for such a length of time should be presumed to have been *rightly* done; and that the enjoyment for that length of time, without obstruction, afforded ground for presuming that such enjoyment was lawful, and was in pursuance of grant or agreement, according to the nature of the easement: a presumption which in many cases was liable to be rebutted, and if so, was not acted on. But how does this rule (even supposing it was by analogy applied to the *condition* of land) affect the case now before us? No question arises of the presumption of a grant or agreement as the origin of enjoyment; the fact of land remaining in the condition of meadow or pasture for twenty years would, upon obvious principles, be a ground for presuming (in the absence of any proof to the contrary), that it had been previously in the same condition; but if, as in the present case, such presumption be rebutted, and it be shown by distinct evidence that the land was previously in tillage, then the analogy relied on affords no ground for holding that the land was “ancient” meadow or pasture.

M. T. 1860.  
*Queen's Bench*  
**MURPHY**  
 v.  
**DALY.**

I shall now refer to the cases in Equity which have been cited. In *Athyne v. Temple* (a), the bill was filed to restrain defendant from ploughing up “*ancient meadow and pasture grounds*,” being the plaintiff's inheritance, “which premises, according to the grant of them, were to be used only as meadow and pasture, and not “otherwise,” and which ground was rich and fertile,” &c., “and had not been ploughed within the memory of man.” The Lord Chancellor directed precedents to be searched for, and afterwards,

(a) 1 Rep. in Chan. 13.

M. T. 1860. being assisted by the Judges, decreed an injunction accordingly.

*Queen's Bench*

MURPHY

v.

DALY.

Now it is clear that the circumstances of that case differ so materially from those now before us, that the mere decision in it would not be an authority for plaintiff in this case. Independent of the fact that by the grant of the lands they were "*to be used only as meadow and pasture, and not otherwise,*" it appeared that "they had not been ploughed within the memory of man;" and therefore the decision that the ploughing of them was waste, would not rule the case of lands which had been tilled within the memory of living witnesses, and the tilling of which was not expressly prohibited by deed. In giving judgment, however, the Lord Chancellor further declared, "that he had found, by various precedents, that the "ploughing of ancient pasture had been restrained by decrees of "the Court, and that in those cases it did not appear that the "pasture restrained from ploughing was either so ancient or so "rich and fertile as in this case; and further, that whereas ploughing of *meadow* by the law was waste, he conceived that the "ploughing of ancient pasture is of equal value with meadow, as "no less prejudicial," &c. Plaintiff's Counsel rely on this statement as showing that the ploughing of pasture land had been restrained, even in cases where it appeared to have been tilled at some time previous; but it does not appear whether in those cases the tilling of the lands had been prohibited, either expressly or impliedly, by the lease or deed under which they were held. The circumstance of land being expressly granted as meadow or pasture land, might be ground for a Court of Equity to prevent the tenant from tilling it, even though it could not be considered as ancient meadow or pasture, so as to render the tilling of it an act of waste. It appears also from the report, that one question in the case was whether the ploughing of "ancient *pasture*" should be restrained in the same manner as the ploughing of "ancient *meadow*?" And the search for precedents appears in some measure to have been directed with reference to that question. The case of *Tresham v. Lambe* does not appear to have been cited to the Court. It would indeed have been an authority for granting the injunction in *Atkins v. Temple*, as it appeared that the pasture had not been previously

ploughed at all. We have been also referred to the case of *Fermier v. Maund* (a). The report of it is very brief, merely stating that "the Court would not give way to the ploughing of ancient pasture, though it was insisted on that the nature of the ground was for tillage, and had been formerly ploughed." The facts of that case are not given; it does not appear whether the lands were held under any lease or instrument dealing with the lands as pasture, or prohibiting their being tilled, or how far the fact of their having been previously ploughed was established by evidence; or upon what particular ground the Court decided. I may observe that neither of these cases of *Athyns v. Temple* and *Fermier v. Maund* is referred to in *Vin. Abr.*, as overruling or qualifying the decision in *Tresham v. Lambe*. The case of *Goring v. Goring* (reported in 3 *Swanst.*, p. 661) has also been relied on by plaintiff's Counsel. In that case Lord Nottingham refused to restrain a tenant under lease, from ploughing pasture land (though it had not been ploughed after the lease for thirty years), because it had been ploughed about six years before the lease, and was not therefore "*ancient pasture*" at the time of the lease; but he states, in his judgment, to the effect that, if the land had been in pasture for thirty years while out of lease, it would have been, at the expiration of that period, "*ancient pasture* within the rules of the Court. This observation of Lord Nottingham's was certainly at variance with the decision in *Tresham v. Lambe*; but though it was the opinion of a very eminent Judge, yet, as the question on which it was given did not arise in the case before him, the expression of opinion may be regarded as extra-judicial, and as not having the effect of overruling that previous decision.

All the cases to which I have hitherto referred were decided in England; and it will be observed that in none of them, either at law or in equity, is the term of *twenty years* suggested as the period after which land, remaining in meadow or pasture and out of lease, would become impressed with the character of "*ancient meadow or pasture*." In *Goring v. Goring* Lord Nottingham, as I have observed, mentioned the term of thirty years; but if there was

M. T. 1860.  
*Queen's Bench*

MURPHY  
v.  
DALY.

(a) 1 Rep. in Chan. 62.

M. T. 1860.  
Queen's Bench

MURPHY  
v.  
DALY.

such a rule of law, as contended for by plaintiff's Counsel, we should naturally expect that, in some of those cases, reference would have been made to this period of twenty years, instead of leaving the question in such uncertainty, and to be settled by a supposed analogy to the Statute of Limitations, particularly as it is conceded that land tilled within less than twenty years would not be ancient pasture.

We have, however, been referred to some equity cases in Ireland in which this period of twenty years is mentioned: one of those is *Creagh v. Carmichael* (a). In that case the affidavit, on which the application for an injunction was grounded, stated generally "that the lands were ancient meadow and pasture," but did not state the deponent's means of knowledge, or the grounds on which he came to that conclusion; and Baron Richards directed that deponent should make a further affidavit, stating "that he had known the lands for twenty years, and that they had not been broken up at any time within that period." This case may be accounted for on the principle to which I have already referred, that the fact of land having remained in meadow or pasture for twenty years is *prima facie* evidence of its having been previously always in the same condition, and that such evidence should be acted on in the absence of any proof to the contrary; but the case does not establish the proposition that such fact would be conclusive to impress upon land the character of "ancient meadow or pasture," even though it was shown that it was tilled previous to that period. The same observation applies to the case of *Martin v. Coggan* (b), in which, on an application for an injunction to restrain a tenant from tilling ancient pasture, Sir W. M'Mahon, M. R., stated that the usual form of the affidavit required to support such application was, "that the land was ancient pasture or meadow, and had not been burned or tilled for the last twenty years;" and he further stated that it was for the tenant to show "that the land ought not to be considered ancient pasture, by reason of its having been used in tillage previously to the date of his lease." He thus laid down the proposition generally, without stating that such previous tilling

(a) 7 Ir. Eq. Rep. 334.

(b) 1 Hog. 120.

should have been within twenty years before the lease. In a subsequent case, however, of *Morris v. Morris* (a), Sir W. M'Mahon certainly states his opinion that "in fee-simple estates a continuance "in pasture for twenty years, pending the life of the donor or "testator, impressed upon land the character of ancient pasture, and "that he had frequently acted on that principle." But, upon referring to that case, it will be seen that the *decision* in it was in favor of the defendant, the injunction having been refused, on the ground that the land had been tilled about three years before the lease, and that the question on which Sir W. M'Mahon stated his opinion did not arise in the case. The remaining authority to which we have been referred is that of *Joley v. Stockley* (b), in which, on a similar application for an injunction, Sir W. M'Mahon made an order of reference to the Master, to inquire whether the tenant had broken up any part of the land comprised in his lease "which was ancient meadow at the time the lease was executed." The plaintiff applied to have the words "or not broken up within twenty years before," added to the words of the reference, but Sir W. M'Mahon refused to do so, stating "that such fact would be decisive upon the inquiry as directed." Now, his refusal to make that addition to the order (were it not for the reason he assigned for it) would have been rather an argument against the proposition contended for by the plaintiff in this case, as it would have been a necessary result of the principle, that the land was not to be considered as conclusively impressed with the character of *ancient meadow* from the mere circumstance of its not having been broken up for twenty years before the lease; but the reason assigned by Sir W. M'Mahon for the refusal was, that it was *unnecessary*, inasmuch as, if the land had not been broken up for that period, it would be conclusively *ancient meadow*. With respect, therefore, to these two cases, of *Morris v. Morris* and *Joley v. Stockley*, the opinions expressed by Sir W. M'Mahon upon the question now before us are (as I have already observed with respect to *Goring v. Goring*) to be regarded as extra-judicial, and not as decisions overruling that in *Tresham v. Lambe*. It is further to be considered that the present action has been

M. T. 1860.  
Queen's Bench

MURPHY  
v.  
DALY.

(a) 1 Hog. 238.  
VOL. 13.

(b) 1 Hog. 249.  
34 L

M. T. 1860.  
*Queen's Bench*

MURPHY  
v.

DALY.

brought under an order of the Court of Chancery, made on an application to restrain the tenant from tilling the land, and was brought for the purpose of deciding the question now before us. The lease to defendant was made by the Master of that Court (a receiver having been appointed over the estate); and if the cases before Sir W. M'Mahon are be considered as having established (notwithstanding the case of *Tresham v. Lambe*) that the rule of the Court of Chancery is as contended for by plaintiff—namely, “that land, remaining in meadow or pasture for twenty years before a lease, and not tilled during that period, became conclusively impressed with the character of ancient meadow or pasture, although it had been tilled a few years previous to that period,” it appears to me that the Court would not have directed this action to be brought, but would, on the motion, have decided the question against the defendant, in accordance with such established rule. Upon these several grounds, I am of opinion that the case of *Tresham v. Lambe*, referred to and adopted in the subsequent treatises I have mentioned, is an express authority in defendant's favor; and that we should follow that authority, notwithstanding the contrary opinions expressed in cases where the question now before us did not arise, and where its consideration was not requisite for their decision; and that accordingly the lands in question, having been tilled about twenty-six years before the lease to defendant, should not be considered as ancient meadow or pasture at the date of that lease.

LEFROY, C. J.

In this case my learned Brethren have lightened very much indeed the duty which I should have had to perform, if their industry and learning had not supplied all the materials applicable to the present case. Every decision which can be found at Law or in Equity upon this subject has been referred to by my learned Brethren; and every observation which I could make in support of the conclusion to which, upon a review of those authorities, I have come, has been anticipated by my Brother O'BRIEN. Under these circumstances, I might stop here; but it occurs to me to advert,

more especially perhaps than has yet been done, to the very question which we have to decide, and to the document upon the construction of which we must come to our decision.

M. T. 1860.  
*Queen's Bench*

MURPHY  
v.  
DALY.

The question turns upon a covenant in a lease; and the breach of that covenant, which the plaintiff has assigned, is, the breaking up of land which at the time of breaking up was "*ancient* meadow." The plaintiff, therefore, has taken upon himself to establish that breach, and to show that the meadow so broken up was, in the strictest sense of the term, *ancient* meadow. The qualification of the word "meadow" must therefore have some import; and the word "ancient" can, in point of law, import nothing less than this—that the meadow so broken up was prescriptively meadow, that is to say, according to the uniform interpretation of that term, meadow beyond the time of living memory; and therefore it at once raises the question, whether proof can be given that there was a period within living memory during which that meadow had been broken up? for on all hands it is conceded that, after the meadow has been broken up, there is no waste. The breaking up of *ancient* meadow unquestionably is waste; but, in order to constitute such a breaking up waste, the meadow must upon this averment be shown to have been *ancient* meadow, that is to say, the land must have been meadow from beyond the time of living memory. I might therefore rest my judgment upon this ground that, upon the traverse of the plaintiff's averment that the land broken up was *ancient* meadow, the defendant has shown by the testimony of living witnesses, that this very land had been broken up within a period of twenty-five or twenty-six years. As to the other ground upon which this conditional order was granted, namely, that the verdict was against the weight of evidence, it is granted that the verdict was a correct verdict—that the jury had evidence which authorised them so to find; and therefore I might rest content with saying that, upon this third issue, the verdict was right in point of law as well as in point of fact. There is, however, another observation which, although it has been very much anticipated, I wish to make, and which arises upon the manner in which this case has come



M. T. 1860.  
*Queen's Bench*

MURPHY  
v.

DALY.

before the Court. The case comes from a Court of Equity, to ascertain whether the acts complained of constitute waste. Cases decided in Courts of Equity have been referred to, the drift of which, it is said, goes to establish that, in those Courts and according to the doctrine held in them, these acts would be deemed waste. We may I think presume that a Court of Equity is more competent than, or at least as competent as, we are to put a construction upon the effect of its own decision; and yet we have a Court of Equity declaring that its own decision does not, in the contemplation of that Court, decide that these acts are waste or are not waste, but sending the parties to a Court of Law to ascertain whether the acts do constitute waste or do not constitute waste, thus showing that *æquitas sequitur legem*. But why does a Court of Equity interpose by injunction in cases in which the land has remained for twenty years in an unbroken condition? Because an uninterrupted user for twenty years of a right is *prima facie* evidence of prescription, just as in receiving testimony, the Court of Equity has made uninterrupted user for twenty years *prima facie* evidence for its purpose to restrain irreparable injury—to restrain acts which may amount to waste—until the right shall have been decided at Law. Twenty years uninterrupted continuance of land in a given condition is *prima facie* evidence that it had been in that same condition during all previous time. The condition in which anything is found at any given time is evidence that it had always been in that condition, until the contrary is proved. Everything is presumed to have been in all past time in the condition in which it is found, until the contrary has been established; and that presumption is greatly strengthened when it is shown that such had been the actual condition of the subject during at least twenty years. And a Court of Equity says—uninterrupted continuance for twenty years in a certain condition, affords to us *prima facie* evidence that the land was at all times in the condition in which, if it had been from time immemorial, to break it up or to alter its condition would be waste; and therefore, the purpose of granting an injunction being to prevent that which would be an irreparable injury and a mischief,

which could not afterwards be done away with, we will upon that ground restrain the tenant from breaking up the land, until the right shall have been decided at Law. There may be a right to break up the land, since it may have been broken up during the twenty preceding years, and it might have been broken up beforehand. We will have these questions, the decision of which may materially alter the case, decided by a Court of Law; and in the meanwhile we will restrain that breaking up of the land which, if it eventually turns out that the land was ancient meadow, would constitute an irreparable injury. Now, the criterion of what constituted waste at common law is this: making a change in the nature and quality of the land, or, as it is said, affecting the course of husbandry; because, if ancient meadow is once broken up, ages may pass away before it can be restored to its prior condition; as was said by Tindal, C. J.—“Years, perhaps ages, must elapse, before the sod can be restored to the state in which it was before ploughing:” *Simmons v. Norton*. Therefore the breaking up of ancient meadow land is waste, because of the length of time which is required to restore the land to its former condition. But it appears from thence that, from the very nature of what is called “ancient meadow,” the land must have been immemorially in that condition; otherwise the observation which I have quoted from the judgment of Tindal, C. J., would have been unworthy of that learned Judge; for it means that the nature of ancient meadow is, that the land must have been in such a condition as would require ages to restore. The very nature of the thing, therefore, carries with it a condition of antiquity, which will warrant the caution and the ready interference of a Court of Equity to restrain acts which might be attended with such irreparable damage; and therefore a Court of Equity does restrain such acts upon a *prima facie* ground—upon an inference, derived from evidence of the existing state of the land, that its antecedent condition had been similar. The changing of land from one condition to another is the essence of waste; because, even as to meadow land, we find it laid down in an old authority, that “the lessee may better “a thing of the like kind, as by digging a meadow to make a drain “or a sewer:” *Darcy v. Ashwith*:—and, if he breaks up the land

M. T. 1860.  
*Queen's Bench*  
**MURPHY**  
*v.*  
**DALY.**

M. T. 1860.  
*Queen's Bench*  
**MURPHY**  
 v.  
**DALY.**

only so far as to make a drain to carry off the water, that operation is not waste, since it leaves the land to be *ejusdem generis* as what it was before. The mere making of drains, although the land is thereby broken up, does not change its nature, and therefore does not amount to waste. The reason, which is given in addition to that of the inconvenience arising from the length of time which is required to restore the land to its condition of ancient meadow, is, that the change may raise a difficulty upon the evidence of title: for in former times, when a real action was the only mode of recovering land, the utmost nicety was required in the writs; and if the allegation in the writ was, that the land was either meadow, or pasture, or arable land, and it turned out that the land was not of the alleged character, the party failed in his writ; and, secondly, because in the Court of Common Pleas, in which, so far as fines and recoveries were concerned, real actions continued to be brought, as Tindal, C. J., observed—"It is a matter of daily practice in this Court to amend fines and recoveries on account of mistakes in the description of land, and the ground of such amendments is, that these documents certify the title and identify the land, by reference to the uses to which it is applied:" *Simmons v. Norton*. Therefore, to the reason of law requiring that land should be preserved by the lessee in the condition in which it was by nature, there was added, by statute, the protection of the Common Law Courts, to secure the continuance of land in its then condition, by attaching, to the changing of the nature of land in that way, this penal consequence—that such a change was made, by the Statute of Gloucester, a ground of forfeiture. That statute not only imposed the penalty of a forfeiture, but also provided a writ of estrepement, by which the lessee was inhibited from proceeding to treat the land in contravention of that statute; and therefore when, in the Court of Chancery, writs of estrepement fell into disuse, the Court of Chancery adopted the principle on which those writs were founded, and granted an injunction, in the nature of a writ of estrepement; carrying out the principle of the law to prevent an irreparable mischief; but only *ad interim* to stay the party's hand until the right should have been adjudicated upon. It was open, however, to

the party to issue a writ; and thus it appears that, in the judgment of a Court of Equity, it was, and still continues to be, the right of a party to try the question whether a certain act constituted waste. And so we have this very case sent to this Court to ascertain whether, at law, the acts committed amounted to waste? Now, following up what was said by my Brother O'BRIEN, I must say that not one solitary case can be found in the books of law in which it is shown that meadow land which, although it had not been broken up merely within the time of living memory, was, nevertheless, at the time of the commission of the supposed waste, apparently meadow, and in which there was, as there was in *Tresham v. Lambe*, evidence, by signs on the land itself, that it had been broken up at some time. There is no case in the books of law in which land in that condition has been held entitled to the protection of *ancient* meadow. I cannot find that anything short of prescription would protect land in that condition, and bring it within the Statute of Gloucester; and I think that the reason I have given why a Court of Equity interferes by injunction does not apply here, and cannot decide the question what is waste in the contemplation of law. The case of *Tresham v. Lambe* shows that evidence beyond that of living memory may be given, to show that the land had undergone a change which divested it of the character of *ancient* meadow. Until evidence of the change is produced, the meadow land must be taken to be *ancient* meadow or pasture land; and so the Judges in the case before Tindal, C. J. (*Simmons v. Norton*), spoke indifferently of meadow and of *ancient* meadow. That circumstance is quite conclusive to show that, when they used the term "meadow," and applied to it all the authorities which, properly speaking, were applicable to *ancient* meadow, they meant *prescriptive* meadow, and not merely land which is meadow at that very time. All the cases upon waste, in *Vin. Abr.*, were cited when that case of *Simmons v. Norton* was argued. They were founded upon the decision in *Tresham v. Lambe*; and the decision in that case was founded, not on verbal testimony, but upon the signs afforded by the land itself. If, therefore, it was competent for the Judges, who decided *Tresham v. Lambe*, to found their judgment upon

M. T. 1860.  
*Queen's Bench*  
 MURPHY  
 v.  
 DALY.

M. T. 1860.  
*Queen's Bench*  
 MURPHY  
 v.  
 DALY.

evidence collected from signs on the land itself, surely it must be competent for us to decide in this case, that the land was not *ancient* meadow, since we have positive testimony that a change has been effected in the land within living memory. Also the case of *Gunning v. Gunning* (a) is quite decisive. In that case, the averment was that the land had been pasture land *div ante*. But the judgment was arrested; because the circumstance that the land had been pasture land for never so long a time should not stand in the place of the averment that was necessary to bring it within the protection which arises from prescription. The averment should have been, that the land was *ancient* pasture. The protection must be one arising from prescription; and I cannot see any reason, upon the practice of Equity, or upon a review of the authorities, why we should now say that this act of the defendant was waste at Law; and therefore I am of opinion that the verdict of the jury must be sustained both in law and in fact.

Cause shown allowed.

(a) 2 Show. 8.

**Court of Exchequer Chamber.\***

(Error from the Court of Queen's Bench).

J. J. MURPHY, *Plaintiff in Error*;  
 CORNELIUS DALY, *Defendant in Error*.

*Exch. Cham.*

M. T. 1861.  
 Nov. 19

THE only ground of appeal was, the alleged misdirection of the jury by the LORD CHIEF JUSTICE.

Serjeant *Armstrong* and *Fraser*, for the plaintiff in error.

Serjeant *Sullivan* and *J. S. Greene*, for the defendant in error.

*Cur. ad. vult.*

MONAHAN, C. J.

H. T. 1862.  
 Jan. 14.

This case came before the Court on an appeal from a decision of the Court of Queen's Bench. The facts are as follows:—The writ

\* Before MONAHAN, C. J., FIGOT, C. B., BALL and CHRISTIAN, JJ., and FITZGERALD, HUGHES and DEASY, BB.

of summons and plaint was issued on the 28th of January 1859; and by it the plaintiff, who is J. J. Murphy, Esq., one of the Masters of the Court of Chancery, complained that he executed to the defendant a lease of that part of the lands of Ballyderoon called "the Fern," to hold the same, with the appurtenances, from the 1st of May 1851, for a term of seven years, pending the several matters and cause therein mentioned; and that the defendant, by that indenture, covenanted that he would, during the continuance of the demise, manage and cultivate the demised premises, and every part thereof, in a proper and husbandlike manner; and that the defendant further covenanted that he would not, during the term, commit or suffer any wilful or voluntary waste to be committed on the demised premises, or any part thereof. The lease contained the other ordinary covenants to repair, and soforth; but they are not material in the present case.

H. T. 1862.  
*Exch. Cham.*

MURPHY  
v.  
DALY.

The first paragraph of the plaint alleges a breach of the covenant to manage and cultivate the demised premises in a proper and husbandlike manner. Upon that paragraph however no question arises at present. The second paragraph assigns a breach, in the words of the covenant, that, "Since the making of said indenture, and during the continuance of the term thereby granted, to wit, on divers days and times between the 1st day of December 1856 and the 1st day of March 1857, the defendant committed waste on said demised premises, by ploughing and breaking up *"ancient meadow and pasture"*, and converting same into arable and tillage, contrary to his covenant in that behalf."

To the breach of covenant assigned in the first paragraph the defendant pleaded a traverse, "That said several acts were lawful acts, not contrary to good husbandry and proper management, or in violation of defendant's covenant in that behalf." To the second paragraph, on which the question in this case arises, he pleaded, "That the premises ploughed and broken up by the defendant were not *"ancient meadow and pasture"*; and that converting said lands into arable and tillage lands was not contrary to the covenant of the defendant in that behalf:" that covenant being, "that the defendant would not during the term commit,

H. T. 1862. "or suffer, any wilful or voluntary waste to be committed on the  
*Exch. Cham.* "demised premises, or any part thereof."

MURPHY

v.

DALY.

Several issues were settled in relation to the different breaches assigned; but the particular issue on which the question now before us arises is the third, namely, "Whether the lands ploughed up by the defendant, or any of them, were *ancient meadow and pasture*, and whether the converting said lands into arable and tillage lands was contrary to the defendant's covenant not to "commit waste?"

The case came on for trial in the Court of Queen's Bench, before the Chief Justice, in the Nisi Prius Sittings after Hilary Term 1860; and the evidence then given by the plaintiff's witnesses was as follows:—that the lands in question were situated at the confluence of the rivers Araglin and Blackwater; were subject to floods, and (for so long a time as they could remember) had always been in meadow and pasture until the year 1857, when they were broken up and tilled by the defendant; and that, considering the situation of the lands, they considered it bad husbandry to break them up. That was the whole of the plaintiff's case. It does not appear in evidence, nor is it material, what quantity exactly of the lands demised was broken up; but the evidence is general that the lands were broken up and tilled.

The evidence given for the defendant was to the effect that it was good husbandry to break up and till the lands; and consequently that the ploughing and breaking up of them was not a breach of the covenant stated in the first paragraph; but the defendant produced (among others) two witnesses, named respectively David Maloney and Daniel Mahony, the latter of whom stated that the lands in question "had been, to his knowledge, broken up and tilled about thirty-five years ago." Upon cross-examination he said that only a portion of the lands had been broken up, and that the lands so broken up consisted of small fields, of which the fences were thrown down, and then the lands were tilled; not in any way particularising the part so broken up. However, upon the whole of the defendant's evidence, it was clear that, though a portion of the lands was broken up thirty-

five years ago, they were immediately afterwards restored to the condition of meadow and pasture; and that, from that date, that is to say, for twenty-six years immediately preceding the execution of the lease, and continuously until its execution, these lands had been meadow or pasture lands. The question at the trial therefore was, whether the fact of the lands having been in meadow or pasture continuously for twenty-six years immediately preceding the execution of the lease, had impressed on them the character of *ancient* meadow and pasture, within the law of landlord and tenant, so as to make the conversion of them into arable and tillage lands "waste," and a breach of the covenant against waste, which is set out in the lease and plaint? Upon that state of facts, the Chief Justice, after stating the evidence, left the case to the jury, to find a verdict upon the several other issues, according to their view of the case, except as to the third issue; "and upon that issue he held and stated to the jury that "land ploughed up within living memory was not in point of "law *ancient* pasture; and upon this view of the law the Lord "Chief Justice directed the jury to find a verdict for the defendant "on the third issue."

H. T. 1862.  
*Exch. Cham.*  
 MURPHY  
 v.  
 DALY.

To that direction Mr. *Fraser*, of Counsel for the plaintiff, objected, and called upon the learned Lord Chief Justice to inform the jury that, if they believed the evidence, the land, not having been broken up for thirty-five years, on the evidence for the defendant, was impressed with the character of *ancient* pasture; and that his Lordship should direct a verdict for the plaintiff on the third issue. The Lord Chief Justice declined so to direct the jury, but reserved the point of law; and the jury found a verdict for the defendant on all the issues.

The Court of Queen's Bench, at the instance of the plaintiff, on the 18th of April 1860, granted a conditional order to set aside the verdict, on the ground of misdirection, and as being against the weight of evidence, and that a new trial should be had. Subsequently cause was shown against that conditional order by the defendant, in the ensuing Term, before the Chief Justice and O'Brien and Hayes, JJ. Upon the argument of the case, the



H. T. 1862. *Exch. Cham.* Members of the Court differed in opinion; the Chief Justice and O'Brien, J., holding that the lands were not *ancient* pasture, inasmuch as they had been broken up about twenty-six years before the execution of the lease; and that therefore the tenant might break them up without committing waste. On the other hand, Hayes, J., was of opinion that, inasmuch as the lands had been in meadow and pasture during that period continuously, and down to the execution of the lease, they were, at the time of its date, impressed with the character of *ancient* meadow and pasture; and consequently that the defendant had committed a breach of the covenant against waste. The latter was the only point argued before us. There was no argument before us on the other point, namely, whether the verdict was against the weight of evidence; the sole ground of appeal being that the Chief Justice had misdirected the jury in the manner I have stated. The question now to be considered is, was the direction of the Chief Justice upon the third issue right in point of law? The direction of the Lord Chief Justice was to this effect, that land, if it could be shown to have been ploughed up within living memory, was not in point of law to be deemed *ancient* meadow or pasture; and that therefore the jury should give a verdict for the defendant upon the third issue, if they believed his witnesses. Now, the first observation which occurs is, that it does not very distinctly appear what the Chief Justice intended by that charge—whether he meant to convey to the jury that, if it could be shown by any evidence that the land had at *any* time, however remote, been broken up, it would no longer be *ancient* meadow or pasture; or whether he merely meant to say that, if any witness could prove that the land had, within his own personal knowledge and memory, been in tillage, the land had thereby lost its character of *ancient* meadow or pasture. However, it is not very material which was the meaning intended to be conveyed to the jury; because we have all the facts in evidence; and those facts show clearly that part of these lands had in fact been broken up long within the period of living memory, namely about thirty-five years before the trial took place; but I suppose the

MURPHY  
v.  
DALY.

Chief Justice intended that, if it were at any time in tillage, it ceased to be ancient meadow or pasture.

H. T. 1862.  
*Exch. Cham.*

MURPHY  
v.  
DALY.

The first matter therefore to be considered is, whether the direction of the Chief Justice was right in point of law in the first part of it, namely that, in order to impress the lands with the character of *ancient* meadow and pasture, it was necessary that they should not have been broken up within living memory. The case was very fully argued before us in last Michaelmas Term. The arguments urged upon the appeal were I believe substantially the same as those used in the Court of Queen's Bench upon the motion to show cause against the conditional order for a new trial; and, as I understand, the principal, if not the only, authority cited in support of the proposition of law, enunciated in the charge of the Chief Justice, was the case of *Tresham v. Lambe*. The report of that case, upon which the defendant's Counsel relied, is to be found in 2 *Brown. and Gold. Rep.*, p. 46. That report is as follows:—"Lewes Tresham was plaintiff in waste, against John Lambe. The plaintiff supposed the defendant had made waste "by sowing and ploughing *ancient* meadow, the which he had "let to the defendant for years, in R., in the county of Northampton; and sowed it with woade, and prayed estrepement upon "the Statute of Gloucester, cap. 13. And, upon examination, it "appears that the land let was pasture and meadow. The pasture "was ridge and furrow, but had been mowed and used for meadow "for diverse years, and that the defendant ploughed and sowed *that* "with woade; but *this*, which had been *ancient* meadow, he used "as meadow, and did not convert that to arable land. But the "Judges would not grant any estrepement to the pasture, for that "it was ridge and furrow; and it was no *ancient* meadow, although "that had been mowed time out of minde, &c. But to the *ancient* "meadow they granted a writ of estrepement. But *Foster* seemed "to be of another opinion; for that, that it was to sow woade; for "that, that is against common right; and the fume and smell "of that is offensive and infectious; but, if it had been to sow "corne, he agreed as above."

There is no doubt whatever that, if that report of *Tresham v.*

H. T. 1862.  
*Exch. Cham.*

MURPHY

v.

DALY.

*Lambe* is accurate, it would seem that the Judges held that the ploughing up of *ancient* pasture lands, which had never been, according to all appearance, broken up *within living memory*, was waste. But if the Judges held that the fact of the land having the appearance of having been broken up, *at some time or other*, destroyed its character of *ancient* pasture, and that consequently to break such lands up afterwards was not waste—then that case would be an authority in support of the more extensive proposition enunciated by the Chief Justice in his charge—that it would not be waste to plough up land which it could be shown had, at *any* time, been in tillage. Upon looking, however, at the reports contemporaneous with *Brownlow & Goldsborough's Reports*, I must say that it is, to say the very least of it, very doubtful whether the case was accurately reported by Messrs. *Brownlow & Goldsborough*, who, though not Barristers, were very respectable men; they were prothonotaries of the Court, and the editor of these reports gives, in the preface, a very laudatory description of them. However, we all concur in thinking that, though the first proposition there laid down is very right in point of law, namely, that it is waste to plough up *ancient* pasture which appears never to have been broken up within the memory of man, still there is very grave doubt with regard to the soundness of the second proposition, namely, that the ploughing up of pasture land which, for as long a time as anybody could recollect, had been in pasture and meadow, was not waste, *because the land was ridge and furrow*. Accordingly, upon referring to *Rolle's Abr.*, a book of much greater authority than *Brown. & Gold.*, we find that he also gives a report of the very same case. He does not give the case as if he had taken it from *Brown. & Gold.*; but gives it apparently from his own note or personal knowledge. I say so, because whenever he cites a case as being reported elsewhere, he cites it as from such and such a report, and gives the reference; but when he gives the case as from his own knowledge, though he refers to the date and the time of the decision, he does not refer to the source from which he got the information. Accordingly, we find in 2 *Rol. Abr.*, under the title "What Acts are Waste," p. 814, pl. 6, this statement—"If an ancient meadow, which has been

"ancient meadow time out memory, as brook meadow, be converted into arable land, it is waste;—this was decided in the "H, 8 Jac. 1, in the Common Pleas, in the case of *Tresham v. Lambe*,"—evidently meaning the case reported in 2 *Brown. and Gold*. There is however a variation in the report; for he uses the words "brook meadow," which do not occur in the report in 2 *Brown. & Gold.*, and which, as I understand them, mean a meadow occasionally covered with water and liable to be flooded, and which from its nature could scarcely be broken up. Therefore that passage is a good authority for the first proposition in *Tresham v. Lambe* (as reported in 2 *Brown. & Gold.*): but that passage is not any authority for the second proposition in *Tresham v. Lambe* (a), namely, that if it can be shown by any evidence that the land had been broken up at any period, however long ago, *ergo* it is not waste to break it up *now*. That second proposition which, as reported by *Brown. & Gold.*, would seem to support the argument of the defendant, is reported thus in 2 *Roll. Abr.*, p. 815, pl. 7.—"But if meadow sometimes be arable, and sometimes meadow and sometimes pasture, there the ploughing of it "is not waste;" H. 8 Jac. 1, *per Cur.*; that is to say, if land be broken up occasionally, as if it be arable and is then left for a time in pasture, and is then again put into meadow, the breaking up of such land is not waste. And accordingly, that is the version of the second proposition which is given by *Rolle*, in pl. 7, following pl. 6, of the case decided in the same year. Though *Rolle* has not given the name of *Tresham v. Lambe*, we have no doubt but that this is the second proposition of the decision in *Tresham v. Lambe*, which is reported otherwise in 2 *Brown. & Gold*. If therefore we had no authority at all on the subject except this one case, and had to ascertain what really was decided in *Tresham v. Lambe*, we would be disposed to come to the conclusion that the second proposition decided in that case was what is reported in 2 *Roll. Abr.*, pl. 7, p. 815, and not what is reported in 2 *Brown. & Gold*. Be that however as it may, we must ascertain from other old reports what the law was considered to be on this subject. I may

H. T. 1862.  
*Esch. Cham.*

MURPHY  
v.  
DALY.

(a) 2 Br. & Gold.

H. T. 1862.  
*Exch. Cham.*  
 MURPHY  
 v.  
 DALY.

as well state that the other case relied on by the defendant's Counsel is *Gunning v. Gunning* (a). That case was upon a writ of waste; and the defendant pleaded that no waste was committed *modo et forma*. The jury found that the defendant did commit waste *modo et forma* as in the count; and then there was a motion in arrest of judgment, when the defendant's Counsel argued thus:—"The plaintiff in his declaration doth not so much as allege waste done; but leaves it absolutely uncertain, for he says that the defendant did plough up his land which was pasturable, *et sic vastum fecit*; and so *non constat* to the Court that it was waste. And the verdict doth not help it, for that only says that they did it *modo et forma prout in narratione*. Now the ploughing of pasture may be, or may not be, waste; and to be such it ought to have been so time out of mind, and it is not enough to say that this was pasture ground *dis ante*." Now all this was the statement of Counsel. But then Justice Jones said, "Arable and pasture ground are convertible, and that which is one of them this year may be the other the next, and the law doth not so much distinguish;" and therefore judgment was stayed. Now the only decision in that case was, that judgment should be arrested; the only allegation in the declaration being, that the defendant committed waste by ploughing up land which was pasturable; without any statement for what length of time the land had been in pasture, or anything else connected with it. Indeed, for anything appearing to the contrary in that declaration or verdict, it might have been the fact, as Mr. Justice Jones suggested, that it was arable land one year and pasture land the next year; and that the declaration left it uncertain whether such had or had not been the case in point of fact. Therefore *Gunning v. Gunning* is not a decision of the Court that, in order to constitute the breaking up of land waste, the land must have been in pasture from time whereof the memory of man runneth not to the contrary.

The other old authorities on the subject are very numerous; and I may as well begin with the next proposition in *2 Rol. Abr.*, pl. 8, where the law is laid down thus:—"The conversion of

(a) 2 Show. 8.

“meadow into arable is waste; for it not only changes the course of husbandry, but the proof of his evidence.” That is the proposition laid down in pl. 8, referring to *Co. Lit.* and to *Hobart's Reports*, as authorities. The passage referred to in *Co. Lit.* will be found at 53 b. It is this—“If the tenant convert arable land into wood, or *e converso*, or meadow into arable, it is waste; for it changeth not only the course of his husbandry, but the proof of his evidence.” That is the proposition laid down by *Coke*, and the case in *Hob. Rep.* is *Lord Darcy v. Askwith* (p. 234), decided in the 15 *Jac.* 1. That was an action of waste, upon a lease for years, for felling of oak trees. The defendants pleaded that they felled these oak trees for the making of certain specified utensils to be used in and about certain coal mines, parcel of the demise, and without which they could not dig for and get the coals out of the pits; and did use the said trees accordingly, whereupon the plaintiff demurred in law. And it was held a bad plea, “because it did not allege that the mines were open at the date of the lease, and therefore it should be taken that they were mines opened since the lease, because that is strongest against the defendants that plead it. Now then if mines had not been granted by special name, it had been waste to open a mine anew, for it is generally true that the lessee hath no power to change the nature of the thing demised: he cannot turn meadow into arable, nor stub a wood to make it pasture.” The words there are general, and do not confine the restriction to lands that have always been meadow or pasture. The case of *Maleverer v. Spinke* is reported in 1 *Dyer*, 35 b. The plaintiff declared that he let to the defendant a house, and six acres of land, and six acres of wood; and that the defendant committed waste by cutting down and felling forty ashes, each of the value of twelve pence, and seven oaks, of the value of, &c., growing *sparsim* upon the said acres of wood. As to thirty-six ashes, the defendant pleaded *nul waste fait*—as to the seven oak trees, &c., and as to the four ashes, protesting that they were not of so much value, &c., for plea said that they grew upon one acre of land of the aforesaid tenements, which acre has been used from time immemorial to be arable, and for the melioration of the land, for

H. T. 1862  
*Exch. Cham.*  
 MURPHY  
 v.  
 DALY.

H. T. 1862.  
*Exch. Cham.*  
 MURPHY  
 v.  
 DALY.

ploughing and sowing, and for the maintenance of husbandry, he cut down, *prout*, &c. The plaintiff demurred; and the Court held the second plea bad, "for the *termor* cannot do a tort to the inheritance for his own convenience and advantage; for he cannot "convert arable land into wood, or wood into arable land, or "convert meadow into arable land; and if he do it, it is waste." These words, again, are general.

A modern case, of *Simmons v. Norton (a)*, was also cited. The point really decided in that case does not bear upon the present case; but some parts of the judgment in it are of importance. It was a writ of waste, brought by the reversioner against tenant for years, for ploughing up ancient meadow land, and cutting down timber. The defendant pleaded *nul waste*, and at the trial attempted to show, as to the ploughing, that the state of the meadow land was such that it was improved by being ploughed and broken up. The only point decided by the Court was that, even if this constituted a good defence, it should have been specially pleaded, and could not be given in evidence under the plea of *nul waste*; but the Chief Justice, in the course of his judgment, says:—"It is clearly established by several authorities, that ploughing meadow land is "waste; and one of the reasons given is, that it alters the evidence "of title; a reason which I am not disposed to treat lightly. . . . "Ploughing meadow land is also esteemed waste on another account, "namely, that, in ancient meadow, years, perhaps ages, must elapse "before the sod can be restored to the state in which it was before "ploughing. The law therefore considers the conversion of pasture "into arable as *prima facie* injurious to the landlord, on these two "grounds at least." Parke, J., said:—"Ploughing up meadow "ground is clearly waste; because it changes the course of husbandry and the evidences of title; and, when the waste is the "act of the party, any excuse he has to offer must be specially "pleaded. It is only where the waste happens by the act of God, "or the like, that the general issue is the proper plea." It will be observed that both those learned Judges lay down the rule generally that ploughing of meadow is waste, and do not confine it to

(a) 7 Bing. 640.

ploughing of land that has never been in tillage. These are the principal cases to be found in the Common Law Reports on the subject.

We must not however confine our attention to the decisions of Courts of Law; we must also consider the decisions of Courts of Equity in England and Ireland, in which those Courts have been called upon to determine what was waste between landlord and tenant; and in so doing had no authority to hold that to be waste in a Court of Equity, which would not be equally so in a Court of Law. In most cases the relation of landlord and tenant is created by written instruments, the construction of which must be the same in both Courts. The first case to which I shall refer is *Atkins v. Temple* (a). It was a bill to restrain the defendant from ploughing up *ancient* meadow and pasture grounds, being the plaintiff's inheritance; which premises, according to the grant of them, were to be used only as meadow and pasture, and not otherwise; and which ground was rich and fertile, little or nothing inferior to good meadow ground for goodness of soil, and yearly value to be better, and had not been ploughed in the memory of man. It would seem clear that, if by the grant of the lands is meant the lease under which the defendant held, that the plaintiff was entitled to an injunction to prevent the lands being converted into tillage, by reason of the special contract on the subject; but possibly by the word "grant" was intended the deed conveying the property to the plaintiff. However this may be, the report states that the Court, in respect of the generality of the case, directed precedents to be produced (I suppose to ascertain what can be called waste). The precedents being produced, the Lord Chancellor, assisted by the Judges, declared that he did find, by divers precedents, part in the time of the Lord Ellesmere, and others since, that the ploughing of ancient pasture has been restrained by decrees of this Court; and declared that, in these cases so decreed, it did not appear that the pasture restrained from ploughing were either so ancient, or so rich and fertile, as in this case: and his Lordship did further declare that, whereas ploughing of meadow by the law is waste, he conceiveth that the ploughing

H. T. 1862.  
*Exch. Cham.*

MURPHY  
v.  
DALY.

(a) 1 Rep. in Ch. 13.



H. T. 1862.  
*Exch. Cham.*

MURPHY  
v.  
DALY.

of ancient pasture is of equal value with meadow, as no less prejudicial either to the landlord or to the commonwealth than the ploughing of meadow, and is therefore fit to be restrained in Equity; the Judges being of the same opinion; and decreed to forbear ploughing as aforesaid. In that case the Lord Chancellor and Judges must have intended to determine what was waste, irrespective of the covenant between the parties—if in fact there was such a covenant. It is quite clear that they did not consider the law to be, that land must have been in meadow or pasture from time immemorial, in order to constitute it ancient meadow or pasture; for, if so, there was no need for the Lord Chancellor to make a comparison between *Atkins v. Temple* and former cases, in which, as he declared, it did not appear that the pasture restrained from ploughing was either so ancient or so rich and fertile as that in *Atkins v. Temple*. In the same book (p. 62) there is another short case, of *Fermier v. Mound*, which was decided in the 13 *Car.* 1. That case is reported thus:—"This Court would not give way to the plowing up of ancient pasture, tho' it was insisted on that the nature of the ground was for tillage, and had been formerly plowed." Now, here is an express decision of the Court of Chancery, in the 13th year of the reign of *Car.* 1, that they will restrain by injunction the ploughing up of land, though formerly ploughed up; and therefore that, to render it ancient meadow or pasture, it was not necessary that it should never have been ploughed.

There is a case of *Goring v. Goring* (a), in which the same doctrine is laid down; and it is very like a case which was decided in the Rolls Court in Ireland, and to which I shall presently advert. *Goring v. Goring* was decided by Lord Nottingham, in the 28 *Car.* 2, and was this:—"A lessee, in a lease for years determinable on lives, during the last aged life begins to plough, and an injunction was prayed." Lord Nottingham, having stated that, before the Statute of Gloucester, no injunction was granted to restrain the ploughing up of meadow and pasture in Equity, against lessees for years, whose estates were created by act of the parties, without a covenant against waste, proceeded thus:—"But now, in imitation of

(a) 3 Swanst. 661.

"the Law, it hath obtained that, if a jointress go about to deface a seat, or if a lessee for years would make any considerable destruction, this Court usually grants an injunction, and stays the ploughing of meadows or of ancient pastures. Here the pastures had been ploughed within six years before the lease began; and, *ergo*, though the lease have continued thirty years, during all which time the pastures have been unploughed, yet that will not make them ancient pastures within the rule of this Court; for as to the lessee himself, who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance: "*otherwise*"—that is to say, that the rule of law would have been "*otherwise*, if they had been so long out of lease." And why? Because the land, though it had been in pasture for thirty years before the time when the injunction was sought, had been in tillage within six years of the making of the lease. But "*otherwise*," that is to say, they would have been *ancient* pastures "if they had been so long out of lease. Wherefore he granted an injunction "only as to the meadows, but not as to the pastures." That was the decision of Lord Nottingham, as reported by himself, for the case is copied from his MSS. With the exception of one case, to which I shall hereafter refer, these are the principal cases that have been found reported in the English books. We have, however, been referred to several cases which were decided in the Rolls Court in Ireland, in the time of Sir William M'Mahon, and to these cases I shall now advert.

The first of these cases is *Martin v. Coggan* (a). That was a motion for an injunction, in the nature of a writ of estrepement, to restrain the defendant from breaking up and ploughing *ancient* pasture land; and the allegation in the plaintiff's affidavit was, that the land was *ancient* pasture, and that the defendant was ploughing it up. The defendant, by his affidavit, admitted that the land had not been previously broken up within his knowledge, but said that there were ancient plough marks in it; that it was mossy, and required breaking up; and undertook to lay it down again under grass, in the course of good husbandry. The Master of the Rolls

H. T. 1862.

*Exch. Cham.*

MURPHY

v.

DALY.

(a) 1 Hog. 120.

H. T. 1862. said :—"I have often had occasion to consider this subject. I can-  
*Esch. Cham.*

MURPHY

v.

DALY.

"not take the tenant's opinion of the propriety of his course of husbandry; neither can I allow *ancient* pasture to be broken up, though the land requires tillage. The usual form of an affidavit to support an application for such an injunction is, that the land is "*ancient* pasture or meadow, and has not been burned nor tilled for "the last twenty years; and it is for the defendant to show that it "ought not to be considered ancient pasture, by reason of its having "been used in tillage previously to the date of his lease." Other cases show that what the Master of the Rolls there meant was, that if the plaintiff averred the land to be *ancient* pasture, because it had been in pasture for twenty years continuously, previously to the date of the application for the injunction, the defendant might rebut that allegation, or *prima facie* proof of its being *ancient* pasture, by showing that the land had been in tillage within twenty years antecedently to the date of the lease.

The next case is *Morris v. Morris (a)*. That was an application, by a remainderman, for an attachment against the defendant (tenant for life), for the breach of an injunction against committing waste, by ploughing up *ancient* meadow and pasture. The plaintiff's affidavit merely charged generally, that the defendant had committed waste; while the defendant's affidavit denied that any ancient meadow or pasture had been ploughed up since the order for the injunction had been pronounced. His Honor, by consent of the parties, referred it to the Master, to inquire and report whether the land in question was ancient meadow or pasture. The Master reported that two fields, part of the land in question, were *ancient* pasture, as between the plaintiff and the defendant; that they had been under tillage in the year 1795, but were at that time laid down in pasture, and continued in that state until the death of the testator, in the year 1819. It appeared that the lands were held by the testator under a lease for three lives, or forty-one years, and that, by his will, he devised them to the defendant for life, with remainder to the plaintiff in *quasi* fee. The lease to the testator was made in 1798, the lands having been in tillage until 1795, when they were

(a) 1 Hog. 238.

laid down as pasture lands. The lessee continued them in pasture until his death, in the year 1819, and bequeathed his interest under the lease to the defendant for life, with remainder to the plaintiff for the residue of the term, without any restriction as to the manner in which the interest was to be enjoyed. The lands, having been in pasture for about twenty-four years before the testator's death, the question then arose, under the devise, whether they were *ancient* pasture as between the tenant for life and the remainderman. For the plaintiff, it was argued that, because, at the time of the testator's death, the lands had been in pasture for upwards of twenty years, they must, as between the tenant for life and the remainderman, be considered as *ancient* meadow or pasture. But his Honor held precisely as Lord Nottingham had held, in *Goring v. Goring*, saying that, though that was quite true in the case of lands held in fee-simple, yet, as these lands were not held in fee-simple, and had been tilled within three years before the date of the lease, the lessee, were he then alive, would have a right to break them up. Inasmuch, therefore, as the lands were tillage lands, between the landlord and testator, his Honor held that they could not be ancient meadow or pasture, as between persons who both claimed under the testator; as there was no authority for the proposition that an act may be waste, as between a tenant for life and a remainderman, which at the same time would not be waste as between the same tenant for life and his landlord; and his Honor held, simply, that the lands were not *ancient* pasture, because they had been broken up within three years before the lease was executed; but it did not occur to any one that, to be ancient meadow or pasture, they should never have been broken.

Again, the case of *Joley v. Stockley (a)* puts the point, as to the continuance of the lands in pasture for more than twenty years before the execution of the lease, more clearly still. In that case, the plaintiff had obtained a conditional order for an injunction to restrain the defendant from ploughing up some land, which he held under a lease executed in the year 1819. The defendant came in to show cause against that conditional order being made absolute; and,

(a) 1 Hog. 247.

H. T. 1862.  
*Each. Cham.*  
 MURPHY  
 v.  
 DALY.

H. T. 1862.  
*Esch. Cham.*

MURPHY  
v.

DALY.

admitting that he had ploughed up the lands, insisted on his right to do so, as they required tillage, and were not, in point of law, ancient meadow or pasture. His Honor said that, if the lands were ancient meadow or pasture in point of law, at the time of the execution of the lease, the tenant could not be allowed to break them up; but that, as there was a controversy on that point between the parties, he would refer it to the Master, to inquire "whether the defendant had broken up any part of the land comprised in the lease, which was ancient meadow at the time the lease was executed." Counsel for the plaintiff applied to have the words, "or not broken up within twenty years before," added to the words of the reference: the Master of the Rolls refused to add them, but stated that that fact—namely, that the lands had not been broken up within twenty years before the execution of the lease—would be decisive upon the inquiry as directed. I have had inquiries made as to the result of that case, and have obtained a copy of the Master's report, by which he found that a particular portion of the lands was, as between the parties, ancient pasture. And, as far as we have been able to ascertain, we entertain no doubt that he found so because they had not been broken up within twenty years before the execution of the lease. I may add, not merely for myself, but also for my Brother Ball, the Chief Baron, and others, who had considerable practice in the Rolls Court in the time of Sir W. M'Mahon, that the clear understanding among the members of the Bar on this subject was, that, if land had been in pasture continuously for twenty years before the execution of the lease, the character of ancient pasture was, as between landlord and tenant, indelibly impressed upon it, and that it could not be broken up by the tenant.

We have also been referred to the case of *Creagh v. Carmichael* (a), in which an application was made for an injunction, in the nature of a writ of estrepement, to restrain a tenant from committing waste on certain lands, by breaking up ancient meadow and pasture. But the affidavit, on which the application was grounded, contained merely a general statement that the lands consisted of ancient meadow and pasture, and did not state how

(a) 7 Ir. Eq. Rep. 334.

long the deponent had known them. The application for the injunction was made to Baron Richards, than whom no one had more experience in the Rolls Court before Sir William M'Mahon. He required the deponent to make an affidavit that he had known the lands for twenty years, and that they had not been broken up at any time within that period. That was all that he required to be stated in the affidavit. But he did not take the distinction between a period of twenty years prior to the *application*, and a period of twenty years immediately preceding the *date of the lease*. The error probably arose from the circumstance that the application was made in the year 1844—only two years after the execution of the lease.

H. T. 1862.  
*Exch. Chanc.*  
 MURPHY  
 v.  
 DALY.

At first we were under the impression that no case had arisen in England in which the term of twenty years was supposed to give to land the character of ancient meadow or pasture. My Brother Christian however has furnished us with a case, in which it appeared that one of the Judges there recognised the doctrine as to twenty years being the required period—I allude to the case of *Birch v. Stephenson* (a). The facts of that case, so far as they relate to the decision, do not exactly bear on the present case; for the question in that case was as to the construction of a covenant in a lease. The declaration stated a demise of certain lands for a term of years, at a certain yearly rent; “and yielding and paying therefor, during the last twenty years of the term, unto, &c., the further yearly rent or sum of £5 for every acre of meadow or pasture ground thereby leased, which the lessee, &c., should plough, dig, break up, ear or convert into tillage, or permit or suffer, &c., during the said last twenty years of the term; and so after the same rate for any greater or lesser quantity than an acre, or for any less time than a year; and the lessee for himself, &c., covenanted with, &c., to pay, &c., and also the rent or sum of £5 for every acre of the meadow or pasture ground thereby leased, which should be so ploughed, &c., during the last twenty years of the term.” The plaintiffs alleged, for a breach, that the defendants, within the last twenty years of the term, did plough, and permitted and suf-

(a) 3 Taunt. 469.

H. T. 1862.  
*Exch. Cham.*

MURPHY  
 v.  
 DALY.

ferred to be ploughed, divers, to wit, sixty-five acres of the said pieces of the meadow ground called "Hawke's Parks," which, at the time of the making of the lease, was meadow and pasture ground of the demised premises, whereby, &c. The defendants pleaded, in bar of the action, that, before and at the commencement of the last twenty years of the term, the sixty-five acres so ploughed, and permitted and suffered to be ploughed, as in the declaration was alleged, were ploughed, dug, broken up and in tillage, and continually from thenceforth until the time when the same were ploughed by the defendants, as in the same declaration mentioned, continued to be and were in tillage, and were not, nor was any part thereof, during any part of the same last twenty years of the term, until or at the time of their so ploughing the same as aforesaid, meadow or pasture ground of the demised premises. To that plea the plaintiffs demurred; and then the question arose, what was the meaning of the covenant? The Judges held that its meaning was, that the lessee or his assigns should not in fact have the lands, or any part of them, in tillage, during any part of the last twenty years of the term, and that the covenant was broken by having them in arable land during that time. That was the unanimous decision of the Court. But the matter on account of which I refer to this part of the case occurs in the judgment of Lawrence, J., who said:—"I am of the same opinion. I agree "with my Brother Sellon that it was a matter indifferent to the "lessor what was done during the first part of the lease, so long as "his reversion was not injured. Therefore he says, you may do "what you will during the first period; but whatever was meadow "when I demised, must be meadow for twenty years before I take it "back, that I may receive it in the state of *ancient meadow*." That is to say, that if, at the expiration of the lease, the land has been for the last twenty years in meadow or pasture, I get back my land as or in the condition and character of *ancient meadow* or pasture.

I have now gone through the authorities on this subject, which, in our opinion, preponderate against the decision of the Court of Queen's Bench. But let us now consider the reason of the case, independently of these authorities. The reason given in all the

cases why you are not to plough up *ancient* pasture land is, because it alters the course of husbandry, and changes the evidence of title. May I ask, whether ploughing land which has been twenty years in meadow or pasture does not alter the course of husbandry as much as if it had been always unbroken? Without any agricultural knowledge, common sense will tell us that if, for twenty years, the land has not been ploughed, it is not deemed, in the course of husbandry, to be tillage land, which is never continued in meadow or pasture for more than a few years; and as to changing the evidence of title, if land was demised some ten or fifteen years since as meadow land, having been so for twenty years preceding, is not the evidence of title changed, as to the land so demised, as if it had been much longer in pasture or meadow? But further, let us consider for a moment the analogy with other cases. There is no statute or written rule as to what length of time constitutes *ancient* lights; nor was there, until recently, in this country any statute which determined what length of time gave a right of way, or a right of water, or several other incorporeal rights. By Act of Parliament, twenty years' continuance of undisturbed enjoyment gives a right to land; but before that statute, twenty years' undisturbed enjoyment gave a right to several incorporeal easements. We therefore entertain no doubt but that it is impossible that a more convenient rule, with regard to *ancient* pasture or meadow, could have been established than that which I have mentioned. It has been fully established, at all events in this country, that the continuance of land in the condition of pasture for twenty years continuously, prior to the execution of a lease, indelibly affixes to that land the character of *ancient* pasture, as between landlord and tenant. Having regard therefore to the facts proved in the present case, the lands in question having admittedly been meadow and pasture lands for more than twenty years before the execution of the lease by Master Murphy to the defendant, we are of opinion that the direction given by the Lord Chief Justice to the jury, on the third issue, to the effect that the lands in question were not *ancient* pasture, because it was proved that they had been broken up within living memory,

H. T. 1862.

*Exch. Cham.*

MURPHY

v.

DALY.



H. T. 1860.  
*Esch. Cham.*  
MURPHY  
v.  
DALY.

was erroneous. We are all of opinion that that was not a correct statement of the law of this country. We are also of opinion that he should have informed the jury that these lands, not having been broken up for twenty years immediately before the execution of the lease, and being for that period meadow and pasture lands, were *ancient* pasture or meadow, as between the plaintiff and the defendant, within the rule of law; and therefore that it was waste to break them up, and was consequently a breach of the defendant's covenant not to commit waste during the term on the demised premises. The result therefore is, that we set aside the order of the Court of Queen's Bench refusing to grant a new trial; and make absolute the conditional order for a new trial, but only upon the ground of misdirection; the parties to abide their own costs of this appeal.

The other Members of the Court concurred.

M. T. 1860.  
*Queen's Bench*

## DOBBYN v. SOMERS.

(*Queen's Bench*).

Nov. 20, 21,  
 22.

THE action was brought by a tenant against her landlord, to recover damages for (amongst other things) the disturbance of a right of turbary.

The fourth paragraph of the plaint claimed damages for the conversion of the plaintiff's turf. The fifth paragraph claimed damages for the disturbance of a right of common of turbary appurtenant to a messuage of which the plaintiff was lawfully possessed.

To the fourth paragraph the defendant pleaded, first, a traverse of the conversion; and, secondly, a traverse of the plaintiff's property in the turf. The defence to the fifth paragraph was a traverse of the plaintiff's alleged right of common of turbary.

The case was tried before the LORD CHIEF JUSTICE at Mullingar, at the Summer Assizes 1860. The plaintiff gave in evidence a lease, dated the 28th of August 1817, from the Rev. J. Vignoles to Joseph Dobbyn, of the lands of C., now in his possession; *habendum*, with the rights, members and appurtenances thereunto belonging or in anywise appertaining, unto the said Joseph Dobbyn, his heirs, executors, administrators and assigns, for the lives of the lessee, of the lessee's wife, and of W. D., or twenty-one years, at the yearly rent of £9.

The plaintiff's witness proved possession of the demised premises by the lessee and his widow (the now plaintiff) ever since the 28th of August 1817; and one witness deposed that he had remembered the lessee and his family cutting turf in the bog since about the year 1807. The plaintiff's eldest son remembered that his parents had cut turf in the bog for the last thirty years; that he and the plaintiff cut turf as usual in 1858; that none of the family had ever paid more than £9 a-year to the landlord for the rent; that, in October 1858, witness went to pay the rent, and laid the amount on the table, when the landlord (without witness's assent) took ten shil-

A demised to B lands, then in the possession of B, as tenant to A; *habendum*, "with the rights, members and appurtenances thereunto belonging, or in anywise appertaining," to B and his representatives. Before the date of this lease, B had been accustomed to cut turf for the use of his family, on a bog which belonged to A, and adjoined the demised lands. —*Held*, that the lease continued to B, and his representatives, the right of cutting turf for domestic use.

*Held*, that the term "*appurtenances*," when used in a lease, is flexible, and must be interpreted so as to carry out the intention of the parties.

M. T. 1860.  
*Queen's Bench*

DOBBYN  
v.

SOMERS.

lings from the sum, saying, "I'll take ten shillings for the turf," and detained that sum; and that a notice, dated the 4th of October 1859, was afterwards served on witness by the defendant's bailiff, cautioning him not to cut any more turf. The defendant came into possession of the lands as landlord in 1855, under a conveyance from the Commissioners of the Incumbered Estates Court, of the reversion of Dean Vignoles, whose agent the defendant had been for thirty years.

The defendant gave in evidence the said conveyance. The schedule to it, which enumerated the tenancies subject to which the conveyance was made, stated that the lease of the 28th of August 1817 was then vested in the plaintiff; but made no mention of any right of turbary as belonging to her, though it expressly mentioned that a right of turbary was reserved in respect of other leases and tenancies therein set forth.

The defendant's witnesses proved that Dean Vignoles had stopped the lessee planting potatoes in the said bog; but one of them, on cross-examination, said, "Since I was born I saw the Dobbyns 'cutting turf there. I heard Dean Vignoles say that the tenants 'had a right of turbary.' A house existed on the land prior to the 28th of August 1817; and the lessee had been for years in possession of it.

The LORD CHIEF JUSTICE told the jury that, "If they believed the evidence, the question as to the right of turbary 'was perfectly clear; for the lease of the 28th of August 1817 'granted to Joseph Dobbyn certain lands as then in his possession, 'with the rights, members and appurtenances thereunto belonging, 'or in anywise appertaining;" which words in point of law gave to the lessee, under the circumstances, a right of turbary, which right had been previously enjoyed. The enjoyment of the right of turbary was proved by evidence, for the witnesses state that, so far back as living memory extends, the lessee and his family had asserted and exercised that right; and upon this part of the case his Lordship left to the jury the question, whether the evidence established a right of turbary in the plaintiff?

The defendant's Counsel called upon his Lordship to tell the jury

that there was no evidence of a right of turbary in the plaintiff, as alleged; and that there was no evidence of such a possession in her as would entitle her to maintain the action; and also to direct a verdict for the defendant, on all the causes of action which were founded on an alleged right of turbary in the plaintiff. His Lordship refused to do so; and the jury found that the plaintiff was entitled to the right of turbary. They also found a general verdict for the plaintiff on all the other causes of action (except the eviction alleged in the first paragraph, on which they disagreed, and the plaintiff entered a *nolle prosequi*), and assessed the damages at £10.

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

*J. T. Ball*, on a former day, obtained a conditional order for a new trial, pursuant to the leave reserved, on the grounds of misdirection as to the right of turbary, and also that there was no evidence to go to the jury of the existence of the right of turbary in the plaintiff.

Against that conditional order—

*G. Battersby* and *Levinge* showed cause.

Counsel, having stated the evidence, contended that the admission made by Dean Vignoles, when he was Dobbyn's landlord, was the strongest evidence of the existence of the right claimed by the plaintiff; as the admission was made in derogation of the Dean's own interest. Proof of uninterrupted user for twenty years would have been sufficient to establish the plaintiff's claim; but the evidence goes much further back, and shows that the right of turbary had been exercised by Dobbyn prior to the date of his lease, which confirmed him in the possession of the right, by granting to him the demised premises "then being in his possession, with the rights, members and appurtenances thereunto belonging or in anywise appertaining." It may be contended that the right of turbary claimed by the plaintiff was not strictly appurtenant. But "the question turns not upon the precise nature, but on the existence of the right:" *Metcalfe v. Rorke* (a). Neither can it be successfully contended that the right of turbary cannot

(a) 8 Ir. Law Rep. 137.

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

pass by grant to the lessee: *Metcalf v. Rorke*: and see 1 *Furlong's Land. and Ten.*, p. 313. Therefore, the words in the lease of 1817 were abundantly sufficient to pass to the lessee any easement, even though it was not specified on the face of the lease. The right to common of turbary passes under the words "with the appurtenances:" *Co. Lit.*, 121, b; *Com. Dig.*, tit. *Grant*, E, 11; *Solme v. Bullock* (a). *A multo fortiori* the easement need not be strictly appendant when, as happened in the present case, it had been enjoyed by the lessee before and at the date of his lease: *Hinchliffe v. The Earl of Kinnoul* (b); *Brown v. Nichols* (c); *Archer v. Bennet* (d); *Hill v. Grange* (e); *Morris v. Edgington* (f). The Court must hold that, under the word "appurtenances," the landlord granted all those things which were usually appurtenant to the lands granted; and that a right of common of turbary which, at the date of the lease was used with the premises thereby demised, passed to the lessee: *Kooystra v. Lucas* (g).

*J. T. Ball* (with him *W. Fetherston H*), contra.

The fifth paragraph claims the right expressly as *common* of turbary appurtenant to a house. The fourth paragraph must rest on the same evidence as is necessary to support the fifth; and, since all question of gift is out of the case, the real question is, was the evidence such as, under the Prescription Act (21 & 22 *Vic. (Ir.)*, c. 42), entitled the plaintiff to a verdict for *common* of turbary appurtenant to a house? The plaintiff's evidence, if sufficient to support the verdict, is also sufficient to establish a like right for all persons in the district who had cut turf in the bog during the time when Dean Vignoles was landlord. This right of turbary in another man's bog cannot be acquired by *parol* license; and if the right rested on a contract with Dean Vignoles or a former tenant upon the lease, the term "appurtenant" will not carry a contract. The lease makes no mention of a house.

(a) 3 Lev. 165.

(c) Sir Fr. Moore's Rep. 682.

(e) Plow. 164.

(b) 5 Bing., N. C., 1.

(d) 1 Lev. 131.

(f) 1 Taunt. 24.

(g) 5 B. & Ald. 830.

Lands, with the appurtenances, are the only things demised. Common of turbary cannot be appurtenant to lands: *Co. Lit.*, 121, *b*. The phrase "with the appurtenances" carries to the grantee only what has *always* been appurtenant. But if the right is based on user, the plaintiff must prove a user uninterruptedly exercised during thirty consecutive years immediately preceding the action. By the 21 & 22 *Vic. (Ir.)*, c. 42, s. 1, the alleged cutting of turf must be a cutting in the exercise of a *right*. No evidence of such a *right* has been given. Not one of the witnesses said that the cutting, prior to the lease of 1817, was a cutting as of *right*; and the expression of Dean Vignoles, instead of acknowledging a pre-existing right in the tenant, merely conferred a right from that time. Under section 4 of the 21 & 22 *Vic.*, c. 42, acquiescence for the space of one year in an interruption of the right destroys it altogether. In October 1858, the defendant enforced on the plaintiff the payment of ten shillings for liberty to exercise the right. This action was not begun until the 2nd of May 1860. Therefore the plaintiff's right is barred by acquiescence: *Sug. R. Pr. St.*, p. 173, par. 22; *Bailey v. Appleyard* (a); *Worthington v. Gimson* (b). This right must therefore be now vested in the landlord, unless it passed by the lease of 1817. The right did not pass under the lease, because it did not demise *eo nomine* a house, to which alone the right claimed can be appurtenant: 1 *Fur. Land. and Ten.*, p. 313. If the lease had contained the word "messuage," this right would have passed under the word "appurtenances," because the right would have been referable to the subject-matter of the lease: *Massey v. Gubbins* (c). This right, being incorporeal, cannot be transferred except by deed: 2 *Wms. Saund.*, 113 a, note c; 2 *Tay. Ev.*, sec. 917. The plaintiff supported her case by parol evidence only as to the existence of the right prior to 1817. That evidence is not sufficient to establish the right; and the words in the lease do not create a new right of common of turbary: *Clements v. Lambert* (d). A prescriptive right of this kind cannot exist in an

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

(a) 8 Ad. & El. 161.

(b) 6 Jur., N. S., 1053.

(c) Long. & Towns. 88.

(d) 1 Taunt. 205.

M. T. 1860. occupier, such as the lessee had been: *Davies v. Williams* (a);  
*Queen's Bench Warburton v. Parke* (b).

DOBBYN

v.

SOMERS.

*Levinge*, in reply.

The payment of ten shillings cannot bar the plaintiff's right, because it was made under compulsion, and by a person who had no authority to do any act except to pay the precise rent stipulated. Moreover, the plaintiff continued to exercise the right; and the defendant knew that the payment did not amount to acquiescence; because, on the 4th of October 1859, he served a notice on the plaintiff not to cut the turf. That notice was the first interruption of the right in which the plaintiff acquiesced; and, as the action was begun in May 1860, her right is not thereby barred under the Prescription Act. The establishment of this right in the plaintiff will not establish similar rights in the neighbours; because the plaintiff claims under a lease. The plaintiff averred, and the defence did not deny, that a house existed on the lands before the lease was made. The right had been exercised by the very man to whom the lease was executed; so that the lease re-granted, as it were, the right. The lease, which must be construed most strongly against the grantor, bears on its face strong proof of his intention to hand down the right unimpaired to the lessee; for the lessor granted to the lessee everything that the lessee then had in his possession; and reserved to himself specifically a number of rights to trees, mines, &c. Therefore the lessor, if he had intended to deprive the lessee of this right which he then enjoyed, would have expressed that intention in the lease. The word "appurtenant" may have its meaning extended to meet the intention of the parties, and the exigencies of the case: *Barlow v. Rhodes* (c); *Hinchliffe v. The Earl of Kinnoul* (d). The lessor, not having unity of possession, could not have destroyed this easement, even if he had wished to do so: *Hinchliffe v. The Earl of Kinnoul*.

*Cur. ad. vult.*

(a) 16 Q. B. 246.

(b) 2 Exch. Rep. 64.

(c) 1 Cr. & Mee. 439.

(d) 5 Bing., N. C., 1.

LEFROY, C. J.

The Court are of opinion that the direction given to the jury, at the trial of this cause, was right in point of law. I cannot state the law upon this subject in any way better than that in which I left it to the jury; and as the verdict had for the plaintiff was well sustained by the evidence, and as the direction was accurate in point of law, the conditional order for a new trial must be discharged.

M. T. 1860.

*Queen's Bench*

DOBBYN

v.

SOMERS.

O'BRIEN, J.

The question now to be decided, with respect to the right of turbary claimed by plaintiff, is, whether there was sufficient evidence to go to the jury of that right? The only objection, taken by defendant at the trial, to the charge of the LORD CHIEF JUSTICE was, that he should, without leaving any question to the jury, have directed a verdict for defendant, on the ground that there was no such evidence. No further objection was taken to any particular directions given by him on the matter. I am clearly of opinion that there was sufficient evidence to entitle the plaintiff to have the question of her right left to the jury, and to sustain the finding of the jury in her favor. It appeared on the trial that, by the lease of August 1817 (under which plaintiff claims), the Rev. J. Vignoles demised to Joseph Dobbyn, deceased (plaintiff's husband), and his heirs, certain lands, "*as then in Dobbyn's possession,*" to hold same, "*with the rights, members, and appurtenances thereunto belonging, or in anywise appertaining,*" for three lives, one of which is still in being; that the messuage or house, in respect of which the right is claimed, was then on said lands, and accordingly constituted part of the premises demised by said lease, though not expressly named therein; and that Dobbyn, the lessee, had been, previously to said lease, in possession of said house and lands. It also appeared that the bog, upon which the right of turbary is claimed, belonged to Mr. Vignoles, and that his estate and interest in said demised premises, and in said bog, were sold and conveyed to defendant, by the Incumbered Estates Court, in 1855. Plaintiff contends that, by said lease, a right to cut turf on said bog, for the use of said house,



M. T. 1860.  
*Queen's Bench*  
**DOBBYN**  
*v.*  
**SOMERS.**

during the continuance of said lease, passed to Dobbyn, under the words "*rights, members, and appurtenances,*" and that she is now entitled to that right, being in possession of said house, as claiming under Dobbyn. It was proved that, for a period of between forty and fifty years before the trial, the right of turbary had been exercised by Dobbyn, the lessee, and by plaintiff, his widow, who succeeded him in the possession of the house; and that upon one occasion, subsequent to the lease, but long antecedent to the sale by the Incumbered Estates Court to defendant, Mr. Vignoles had expressly declared that Dobbyn was entitled to the right of turbary in question. It is contended, for defendant, that there was no positive evidence as to the exercise of this right *prior* to the lease of 1817, the witnesses having stated, in general terms, that it had been exercised for a period of between forty and fifty years before the trial. But when clear evidence is given of the exercise of a right during a long period of time, it is competent for a jury to infer, from such evidence, that the right had been exercised antecedent to the earliest period at which its exercise was actually proved by the witnesses. And even assuming that, in this case, the direct evidence did not prove the actual user or exercise of the right at an earlier period than 1820 (which was forty years before the trial), it was surely competent for the jury to infer that the same state of facts had existed from and previous to the date of the lease (which was made in 1817), and that Dobbyn, being in possession of the premises, had previously exercised the same right; more especially having regard to the declaration of Mr. Vignoles, which was not (as contended for defendant) a mere consent to Dobbyn's user of the right, but a positive statement that he was entitled to it.

The next question is, whether, supposing that the right of turbary had been enjoyed by Dobbyn during his former tenancy of the house and lands, previous and up to the date of the lease of 1817, such right was granted to him by that lease, under the words "*rights, members, and appurtenances thereunto belonging?*" It is settled that if a right of turbary exist, as appurtenant to a house, it will pass under a grant of the house "*with its appurtenances,*" though the right is not particularly specified, and though no further words

of description are used : *Solme v. Bullock* (a). Defendant's Counsel seek to distinguish the present case, on the ground that the house, in respect of which the right is claimed, was not expressly mentioned in the lease of 1817, as part of the premises thereby demised ; and that, accordingly, as a right of turbary can only be appurtenant to a house, and not to land merely, such right did not pass by the grant in that lease "of all rights and appurtenances belonging or appertaining to the demised premises." But as the land on which the house stood was demised by the lease, and as the house was therefore part of the demised premises, I do not see why a grant of all rights and appurtenances "*to said demised premises belonging or appertaining,*" should not be considered as including any right belonging or appertaining to *part* of said premises. We were referred to a passage in 1 *Fur. Land. and Ten.*, to the effect that a mere demise of "a *farm*, with the appurtenances thereto belonging," would not pass a right of turbary, though previously enjoyed by the tenant ; but this does not apply to a case where a house is on the land, and is therefore part of the demised premises, though not expressly named in the lease. In the case now before us, however, it is not necessary for the plaintiff to establish that the right which she claims was, at the date of the lease of 1817, "*an appurtenant*" to the house, in the strict legal sense of that term. It would be difficult for her to do so. But there are authorities to show that the word "appurtenant" is capable of a wider interpretation, and of carrying more than would be "*an appurtenant*" in its strictly legal sense : *Morris v. Edgington* (b) ; *Barlow v. Rhodes* (c) ; *Hinchliffe v. Kinnoul* (d).

There is (as I have already observed) sufficient evidence in this case to warrant the conclusion that Dobbryn, having been in possession of the premises as tenant previous to the lease of 1817, exercised and enjoyed the right of turbary during such previous tenancy, and as incident thereto. The lease grants him the lands, "*as then in his possession,*" with all the appurtenances, &c., thereto belonging. And considering all the evidence in the case, and parti-

M. T. 1860.  
*Queen's Bench*

DOBBRYN  
v.  
SOMERS.

(a) 3 Lev. 165 ; and Co. Lit. 121, b.

(b) 3 Taunt. 123.

(c) 1 Cr. & M. 439.

(d) 5 Bingh. N. C. 25.

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

cularly the continued enjoyment of turbary *as a right*, subsequent to the lease, I think the lease may fairly be construed as having granted to Dobbyn what he had before, including, not merely the land, but also the right of turbary, which he had enjoyed during his previous tenancy in connection with the land. I see no ground, therefore, for disturbing the verdict which has been found for the plaintiff.

HAYES, J.

I also am of opinion that there was evidence for the jury in this case, and that the plaintiff is entitled to retain the verdict which she has obtained. I lay out of view altogether all the difficult considerations, and all the argument founded upon the Prescription Act; for I think them wholly inapplicable to a case in which a person is insisting merely upon rights claimed by her as a tenant. Now, as to the question whether this right of turbary was "appurtenant," I think that the right did pass by the lease, as appurtenant to the *premises* demised. I find, in the notes of the LORD CHIEF JUSTICE, who tried the case, that one of the witnesses states that he knew Joseph Dobbyn, the lessee, who died in 1847, to have been in possession of the land for between forty and fifty years. Joseph Dobbyn, the plaintiff's son, says that they cut turf in No. 5 (a), (the bog in question) as long as he remembers—that is to say, for thirty years; that his father the lessee, and his uncle, made the drain between the demised land and the bog; and that for above twenty years they have used the bridge that is over the drain.

The evidence in the case thus carries us back to a period anterior to the date of the lease, which was executed in the year 1817, and shows us that, prior to that time, the lessee had been in possession, as tenant, of a certain number of acres of land adjacent to the bog of Dean Vignoles, and that he was in the habit of going upon that bog, and of drawing bog-stuff from it for fuel. Things being in that condition, the lease is executed, in the year 1817; and it recites that the tenant was then in possession of those lands. It is also a fact, established by the evidence, that he was in possession

(a) So marked on the map of the estate.

of a house on the lands, which had been in existence for a long time. After the recital which I have mentioned, the lease goes on to demise the premises to "Joseph Dobbyn" (now deceased), "to hold to him and his assigns, with the rights, members, and appurtenances thereto belonging or in anywise appertaining." I do not mean to go into nice controversies concerning the meaning of the word "appurtenances." The case of *Morris v. Edgington* saves me from the necessity of doing so. That was a case in which the word "appurtenance" was held to be most flexible in its application—where it was necessary so to be held, in order to carry out the meaning and intentions of the parties. So, here, when I find that Joseph Dobbyn, the lessee, had been tenant from year to year of a house and lands, and, in virtue of that possession, had been always in the habit of going on the bog, and drawing away bog-stuff from it; and when I find him, while still in that possession, taking a lease of the same premises, "with the rights, members, and appurtenances thereto belonging or in anywise appertaining," it is, in my judgment, pretty clear that it was the intention of the parties that the lease should continue to the tenant every right and privilege which he had previously enjoyed from his landlord. If there was a doubt upon the subject, it would be removed by the expression of Dean Vignoles—used at a time when he was landlord, in receipt of the rent, and when it was against his interest in any way to derogate from his own rights. Charles Dobbyn says that he heard Dean Vignoles say "that they had a right of turbary." That expression must be taken as importing that the tenant had a lease, which secured to him his right of turbary. If this lease, so referred to by Dean Vignoles, bound him, it must also bind the defendant in this case; who, at the time when Dean Vignoles used that expression, was, and for twenty years before had been, the agent over, and has since become the purchaser of, Dean Vignoles's estate in the lands. On these grounds, I am of opinion that the direction of the LORD CHIEF JUSTICE was right in point of law; that the evidence warranted the jury in finding for the plaintiff; and that the verdict had in the Court below should be maintained.

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

M. T. 1860.

*Queen's Bench*

DOBBYN

v.

SOMERS.

FITZGERALD, J.

I too am of opinion that the instruction given by the LORD CHIEF JUSTICE to the jury was correct; and that it put the case on its true ground in point of law. The substantial question on which we now decide is, simply, whether there was *any* evidence to go to the jury in support of the right of turbary claimed by the plaintiff. I have spoken of a *right* of turbary; but I think that on this subject there was a mistake throughout the whole argument of the defendant's Counsel. They argued the case as if the plaintiff's claim was of a *common* of turbary, which would apply to all the tenants on the defendant's estate; and it was said that, consequently, this verdict, if it was allowed to stand, would ruin Mr. Somers, who must thereby be exposed to similar claims, to be made by all his other tenants. This case is not of that character. The verdict establishes that Joseph Dobbyn, deceased, had, prior to the year 1817, in respect of his tenancy of these very premises, a privilege of cutting turf; and that the lease executed in the year 1817 continued that right to him and his representatives during the term thereby created. It does not appear what was the nature of Dobbyn's tenancy prior to the lease. He was, however, in possession of the premises demised; and we may take it that he was a tenant from year to year; and that, in connection with his tenancy, he exercised the right and privilege of cutting turf. The lease of 1817 was then granted; and in it the lessor describes Joseph Dobbyn as a tenant *then* in possession of a certain farm, and grants to him, for twenty-one years, or three lives (of whom the now plaintiff is one), the demised premises, to hold to him and his assigns, "with the rights, members, and appurtenances in any way belonging or appertaining thereto." The construction which we now adopt is, that that lease gave to the lessee the farm as he then had it, with the rights and privileges which he then enjoyed. The evidence given at the trial established that the right of cutting turf had been used by him prior to the year 1817; and that, from the year 1817 down to the year 1858, that right had been enjoyed without interruption. Furthermore, we have—if it were necessary to make the verdict quite satisfactory—the explicit statement of

Dean Vignoles, that the tenants had a right to cut turf in the bog in question. The defendant has asked us to put a rigid technical meaning upon the word "appurtenances;" but we are at liberty to interpret it by the light of surrounding circumstances. The term "appurtenances" is a flexible term; and, putting a reasonable construction on the grant, I think it was the grantor's intention to give the tenant the rights and privileges which he actually enjoyed on the 28th of August 1817—the date of the lease. The right claimed by the plaintiff is not a common of turbary, but a right to cut turf in the bog during the continuance of the term granted by the lease. I entertained some doubts with respect to the pleadings, for the fifth count claims a right of common of turbary. The fourth count, however, being for the conversion of the plaintiff's turf, is sufficient to support the verdict; and I think that there was evidence of the right to go to the jury, and that the direction of the LORD CHIEF JUSTICE was accurate in point of law.

M. T. 1860.  
*Queen's Bench*  
 DOBBYN  
 v.  
 SOMERS.

Cause shown allowed.

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MADDEN v. M'MULLEN.

Nov. 13.

THE plaintiff stated that one William Kerans and the said defendant, and one John Warren, executed to the plaintiff, as secretary to the loan-fund board, their joint and several bond, pursuant to the statute in that behalf, in the sum of £200, conditioned, *inter alia*, that if the said William Kerans, who was thereby recited to have been duly appointed clerk of the Clara Loan Society, should and did justly and faithfully execute his office of clerk of the Clara Loan Society, and should and did from time to time, and at all times when thereunto required by the said society, or by any person or

Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of the debtor, will not discharge the surety, and is no ground of equitable defence.

Independently of the general principles of law, a surety under the provisions of the 6 & 7 Vic., c. 91 (the Loan-fund Act), is precluded from raising this defence.

VOL. 13.

39 L

M. T. 1860.  
*Queen's Bench*

MADDEN  
v.

M'MULLEN.

persons by them in that behalf authorised, or by the loan-fund board, or by the secretary or any other officer or officers, by the said board in that behalf authorised, render a just and true account of all the moneys received and paid by him the said William Kerans on account of the said society, or in execution of his said office, or in relation thereto; and that if he did and should pay over all moneys remaining in his hands, and assign or transfer or deliver all securities and effects, books, papers and property of or belonging to the said society in his hands, custody or power, to such person or persons as the said society, so long as the same should exist and continue duly authorised to act as a loan society, should appoint; and that if he should and did conform to and observe all and every the rules in force for the time being of the said society, and in all other respects well and truly and faithfully perform and fulfil the duties of the said office, then the said bond should be void, but otherwise should be in force and virtue.

**Averment.**—That after the making of the said bond, and before the commencement of this suit, the said William Kerans was duly appointed clerk of the said Clara Loan Society, and, having been so appointed, entered upon such office, and became and was such clerk as aforesaid, and continued in the exercise of such office for the space of two years and nine months, and until the 8th day of January 1860.

**Breaches.**—That while the said William Kerans was such clerk, and continued in said office, and before the commencement of this suit, he did not justly and faithfully execute the said office of clerk to the said loan-fund society; but, on the contrary, received from time to time, as such clerk, several sums of money, amounting to £369. 13s., which were the money of the loan society; and having so received the same, unjustly and wrongfully converted the same to his own use, and appropriated the same, by reason whereof the said sum of money was totally lost to the said society.

That while the said William Kerans was such clerk and continued in such office, and before the commencement of the suit, he did not, though thereunto required according to the tenor of the conditions of the bond, render a just and true account of all the moneys received and paid by him on account of the said society; but that

on the contrary, although several large sums of money, amounting in the whole to £369. 13s., were received by him on account of the said loan society, he did not justly and truly account for the same as having been so received as aforesaid, but wholly neglected so to do; by reason whereof a loss has accrued to the said society of the said sum of £369. 13s.

M. T. 1860.

*Queen's Bench*

MADDEN

v.

M'MULLEN.

That while the said William Kerans was such clerk, and soforth, he did not pay over all moneys of the said loan society remaining in his hands, to the person or persons appointed in that behalf by the said loan society, which was and still is, an existing and duly authorised loan society; but that although several sums of money, amounting on the whole to £369. 13s., remained in his hands as such clerk, he wholly neglected and omitted, and still doth neglect and omit, to pay over the same or any part thereof to such person or persons aforesaid; by reason of which several breaches the said bond became forfeited.

Equitable defence.—That the plaintiff sued as trustee of the said Clara Loan-fund Society, and for and on behalf of the same, and not otherwise; and that the said breaches in the plaint mentioned, and said defalcations, occurred by reason of the gross negligence and mismanagement of the treasurer, honorary secretary and committee of management, and other officers of the said Clara Loan-fund Society, in not, according to their duty, requiring said William Kerans to account; and in improperly and contrary to their duty permitting him to retain said money in his hands improperly; and in not calling on the said William Kerans to pay over the said moneys according to the rules of the said society; and by reason of other gross negligence and mismanagement of the said treasurer, secretary, officers and committee of management; and that but for said gross negligence and mismanagement, the said breaches could not, nor would any of them, have occurred.

Demurrer thereto.

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NOTE.—The points noted for argument were, first—That inasmuch as there was no averment in the defence or on the record that the defendant was a surety for William Kerans, or sued as such surety, the defence was bad in substance. Secondly—That the neglect and mismanagement imputed to the officers of the Clara Loan-fund Society could not bar the right of action of the plaintiff.



M. T. 1860.

*Queen's Bench*MADDEN  
v.

M'MULLEN.

*W. O'C. Morris*, in support of the demurrer.

It cannot be collected from the record that the defendant is a surety, or has been sued as such. An equitable defence could be made available only upon the proper averment that the defendant was a surety: *Mitford on Pleading*, p. 45. But even if that averment were supplied and an amendment allowed, the neglect complained of amounts only to a collateral nonfeasance consistent with the contract, and not to a misfeasance, on which latter alone the equity it was sought to introduce could be founded. If there be an act of positive fraud, a concealment of material circumstances, the surety is exonerated; because *ex turpi causa non oritur actio*: also the creditor, by giving time, exonerates the surety; but the present case does not range under either rule. The duty of the principal is to perform the contract; the duty of the surety is to see that the contract be performed; but the creditor has taken a security which enables him to lie by: *Shepperd v. Beecher* (a); *Peel v. Tatlock* (b); *Mac Taggart v. Watson* (c); *Pitman on Principal and Surety*, p. 197, ed. 1840.

*Palles* (with him *Heron*), for the defence.

The loan-fund societies are trading societies, and notwithstanding their statutable character, are to be governed by the law and custom that regulate trading societies. The defence is assisted by the statute, because the Act of Parliament imposes a duty upon the plaintiff, and it was by the breach of that established duty, that the defalcations of the clerk were caused. That is matter of equitable defence: *Mac Taggart v. Watson* (c); *Story's Equity Jurisprudence*, p. 395. The principle is, that the creditor is a trustee for all the parties: *Mayhew v. Crickett* (d); *Law v. The East India Company* (e). Loss, even of a collateral security, by the neglect of a creditor discharges the surety: *Capel v. Butler* (f); *Watson v. Alcock* (g); (although the decision at law in the last case was adverse

(a) 2 P. W. 288.

(b) 1 Bos. &amp; Pul. 419.

(c) 3 Cl. &amp; Fin. 526.

(d) 2 Swanst. 185.

(e) 4 Ves. 433.

(f) 2 Sim. &amp; Stu. 457.

(g) 1 Sm. &amp; G 319; S. C., 4 De G., M'N. &amp; G. 242.

to the surety): *Parker v. Watson* (a). The Act 6 & 7 Vic., c. 91, s. 14, makes the rules binding upon the officer of the society, and upon all parties dealing with them. The contract in the bond was entered into with reference to those rules, and there was a breach of those rules to the prejudice of the society. The case is stronger than one in which the parties contract with reference to local customs: *Calvert v. The London Dock Company* (b); *General Steam Navigation Co. v. Rolt* (c); *Mutual Loan-fund Association v. Ludlow* (d).

M. T. 1860.  
Queen's Bench  
MADDEN  
v.  
M'MULLEN.

Serjeant *Sullivan* was not called upon to reply.

LEFROY, C. J.

This case has been extremely well argued. Everything that could be said on either side has been urged at the Bar; and it appears to us that the equitable defence cannot be sustained. We rest our decision upon the principle so well and so succinctly put by the learned Counsel who opened the case. The case turns mainly, as was early suggested by my Brother FITZGERALD, upon the Act of Parliament, which, we must recollect, was passed for the protection of Loan-fund Societies—of those very persons who had theretofore been at the mercy of those to whom was entrusted the management of those concerns. With a view to this protection, a course of proceeding was instituted by the Act, according to which the officers of those societies, and especially persons standing in the position of the principal here, should enter into a bond with sureties for the due discharge of their duties; and that the bond should be entered into with a person in the position of the present plaintiff, the secretary of the principal board. That board was instituted for the purpose of affording additional protection to depositors, by means of additional superintendence. The bond entered into with the officer of that board puts out of the case the doctrine of debtor and creditor. The officer does not take the bond as a creditor; nor is it given to him as a creditor. It is given to him for the

(a) 8 Ex. 404.

(b) 2 Keen, 638.

(c) 6 C. B., N. S., 550.

(d) 5 C. B., N. S., 489.

M. T. 1860.  
*Queen's Bench*

MADDEN

v.

M'MULLEN.

purpose of securing more effectually the due discharge of their duties by the officers of the several societies, which are each a species of corporation. The relation of debtor and creditor being quite out of the case, the consequences that would ensue as between principal and surety are also out of the case. But, even if we were to go into these relations, and consider the case as affected by the equities which exist between debtor and creditor, the cases, if I recollect them aright, establish that mere omission—mere non-feasance—will not raise the equities insisted upon here: there must be something in the nature of a positive act, a concurrence, a giving of time—something very different from mere nonfeasance. If, instead of mere acquiescence, there were some agreement on the part of the creditor for a violation of the duty which the principal ought to perform, then the equity would arise. That was exactly the principle of the case referred to; it is what Lord Brougham must be taken to have referred to. In the entire of the comments made by Lord Brougham, he did not go the length of saying that mere omission could introduce into any case the equity which heretofore had always required for its enforcement the doing of some positive wrong. Now, the way in which the matter has been put by the Counsel who opened the case so ably is this:—the obligee rests on his bond; he has no duty cast upon him so long as he is merely quiescent. Concurrence would place him in a different position; but he has a right to rely on the security which he has taken, not merely on the part of the person who is to discharge the duty, but on that of the surety. It is for the surety to see to the discharge of the duty; and therefore the reason of the thing goes with the law; and the principle of that law has been well explained by the learned Counsel for the plaintiff. I am therefore of opinion that the demurrer should be allowed. As far as my own judgment goes, I have expressed my reasons for the decision at which I have arrived; and doubtless my Brethren will give other and valuable reasons for their concurrence.

O'BRIEN, J.

I am also of opinion that the demurrer should be allowed, and that the neglect of the managers of the society to require their clerk

to account and pay over the money in his hands; and the other omissions on their part relied on in the defence are not valid grounds of resisting this action. I think this case falls within the principle laid down by Lord Eldon, in *Wright v. Simpson* (a), where he says:—"As to the case of principal and surety in general cases, I never understood that, as between the obligee and the surety, there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives time, then the surety has the benefit of it. But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor." Defendant's Counsel rely upon a passage in 1 *Story's Equity Jurisprudence* (s. 325), where he states, as the result of the authorities, "that if the creditor does any act injurious to the surety, or inconsistent with his rights, or if he omit to do any act, *when required by the surety*, which his duty requires him to do, and the omission prove injurious to the surety, in all such cases the surety will be discharged." No such facts however exist in the case now before us. It is true that, as the bond was executed to plaintiff in trust for the society, any conduct on the part of the managers of that society, which would be a defence to an action in their names, if the bond had been executed to them, would be equally available as a defence to this action; but it is not alleged that the managers *did* any act injurious to the rights of the surety, or that they were ever required by defendant to call upon their clerk for an account, or for payment of the money in his hands; and there is no authority to show that, under such circumstances, the mere nonfeasance of the creditor, or his neglect to enforce his demands against the principal, would be sufficient to discharge the surety. If a bond be executed by principal and surety to the obligee, as trustee for another party, it may be the duty of the trustee to his *cestui que trust* to call upon the principal to account; and he may be liable to his *cestui que trust* for not doing so: but the mere breach of that duty to the *cestui que trust* would be no defence for the surety, in an action by the trustee against him

M. T. 1860.  
*Queen's Bench*

MADDEN  
v.

M'MULLEN.

(a) 6 Ves. jun., 734.

M. T. 1860.  
*Queen's Bench*

MADDEN  
v.

M'MULLEN.

upon the bond. In this case it may be admitted that it was the duty of the managers, as between them and the society, to have called upon their clerk for an account, and for payment of the money: but that duty did not exist as between the managers and the society, so as to entitle him to rely on a breach of that duty as discharging him from his liability on his bond. The decision of the House of Lords, in *Mac Taggart v. Wilson (a)*, is also an authority for the plaintiff. In that case, a bond was executed by the trustee of a bankrupt's estate and his surety, conditioned for the trustee duly accounting for and paying over all money received by him; and it was held by the House of Lords (reversing the decision of the Court below) that the neglect of the commissioners of the bankrupt's estate, in not calling on the trustee for an account or payment, was no answer to an action brought against the surety on the bond. Lord Brougham, in his judgment, takes the distinction between the case of some misfeasance or act on the part of the creditor injurious to the rights of the surety (such as giving time to the principal debtors, &c.), and the case of mere neglect by the creditor to call on the principal for an account, or to give notice to the society of the principal's default as early as might have been done; and (in page 541) Lord Brougham states that Courts of Equity have never discharged a surety upon the latter ground. In page 540 he says:—"Assuredly it is no argument against my being answerable for a man's not doing a certain thing, that the party to whom I gave the obligation did not see that he did the thing: I had myself undertaken for his doing it; and it is no discharge for my voluntary obligation that the other party (the obligee) did not see to his proceeding." And he adds, that the superintendence of the commissioners, and the obligation of the surety, constituted a double security to the creditors of the estate against the malversation of the trustee.

Defendant's Counsel have relied upon the decisions in *Law v. East (b)*, *Capel v. Butler (c)*, and *Mutual Loan-fund Society v. Ludlow (d)*: but, on comparing the facts of those cases and the

(a) 3 Cl. & Fin. 529.

(b) 4 Ves. 824.

(c) 2 Sm. & St. 457.

(d) 5 C. B. 449.

present, it will be seen that no such circumstances as were held in those cases to discharge the surety exist in that, now before us.

M. T. 1860.  
*Queen's Bench*

MADDEN

v.

M'MULLEN.

HAYES, J.

I am of the same opinion. I think the position set forth in the second cause of demurrer is a sound one; and therefore I think that the demurrer should be allowed.

FITZGERALD, J.

I concur in the judgment of the Court; and I should be content to rest my opinion upon the general principle of law applicable to cases between individuals; but it has been urged, on the part of the defendant, that there is a difference in his favor, by reason of the Loan-fund Act, and the character in which the plaintiff sues. There is a difference; but it militates against the defendant, and is not in his favor. The bond was given under the Loan-fund Act, according to the form given in the schedule to that Act. The statute constitutes a general superintending loan-fund board, with several officers, and with a secretary having a general control over the loan-fund societies. Mr. *Palles*, for the purpose of his argument, called them trading societies. That description is not accurate. These societies are charitable institutions in their nature; the main object is to lend money to the poor on fair terms; and there is a statutable provision that no member of a loan-fund society shall, under any circumstances, derive any pecuniary benefit from his position, and that all surplus funds may be applied to charitable purposes. The Act provides that the officers of loan-fund societies shall be without remuneration, except certain clerks; and it directs that the clerk shall give security, to be by bond, conditioned for the due performance of his duty, and for accounting when called upon. The breach assigned is, that the clerk of the Clara Loan-fund Society, having received some £300 or £400 of the moneys of the society, had absconded with the money; and the defence set up by the defendant is, that the honorary secretary and treasurer neglected their duty, and that the loss had been occasioned by that neglect. My answer is, that the bond was intended to protect the society

M. T. 1860. *Queen's Bench* against this neglect. The defendant contracted with the society that the clerk would do his duty; and that, if the clerk did not, he the defendant would be responsible in this action. The clerk  
**MADDEN**  
*v.*  
**M'MULLEN.** not having done his duty, it was sought to make the defendant answerable. Take a case with which we are all familiar, that of a collector of poor's-rate. If a collector of poor's rate were to become a defaulter, would it be an answer to a claim upon his surety, that the board of guardians had neglected their duty? It would assuredly be no answer.—On these grounds therefore I am of opinion that the demurrer should be allowed.

H. T. 1861.  
*Jan. 18, 19.*

PATRICK KEARNEY *v.* TIMOTHY KEARNEY.

The Common Law Procedure Amendment Act (*Ir.*), 1853, s. 3, repealed the 6 *Anne*, c. 10, (*Ir.*), s. 23, only so far as to destroy the form of action thereby created; but left the right of action unimpaired.

**DEMURRER.**—The plaintiff, one of three tenants in common, sued one of his companions for not accounting, as bailiff to the plaintiff, for the rents and profits which he (the defendant) had received out of certain tenements, more than his own just share and proportion. The count was framed on the 6 *Anne*, c. 10 (*Ir.*), s. 23; and the plaintiff assigned as a breach that “the defendant, although he was afterwards . . . requested so to do by the plaintiff, hath not yet rendered a reasonable account to the plaintiff of the said rents, &c., so received, as aforesaid; . . . but hath hitherto wholly neglected and refused so to do, contrary to the form of the statute in that case made and provided.”

To this count the defendant demurred, on the ground (*inter alia*) “That there is no such statute as that referred to in the fifth paragraph, now in force, under which the cause of action is maintainable.”—It is unnecessary to state the plaintiff's cross-demurrer to the fourth defence, as it was only opened *pro forma*.

*Jellett* (with him Serjeant *Sullivan*), in support of the demurrer.

An action of account cannot now be maintained by a tenant in

common against his companion, as his bailiff, upon a count framed under the 6 *Anne*, c. 10 (*Ir.*), s. 23. The action of account at Common Law was regulated by the Stat. Marl., c. 23; 13 *Ed.* 1, stat. 1, cc. 11, 23; 25 *Ed.* 3, stat. 5, c. 5. The 6 *Anne*, c. 10 (*Ir.*), s. 23, for the first time gave a *right* to a tenant in common to bring an action of account against his companion, as a kind of constructive bailiff. The statute did not merely regulate the mode, or define the form of action, but *created* a right of action. That section has been repealed by the Common Law Procedure Amendment Act (*Ir.*), 1853, s. 3, which has destroyed the *right* to bring this particular action of account. This argument is strengthened by the fact that the English Common Law Procedure Amendment Act, 1852, did not repeal the corresponding English statute (4 *Anne*, c. 16, s. 27). No doubt, the Common Law Procedure Amendment Act (*Ir.*), 1853, s. 5, has rendered it unnecessary to bring a personal action in any particular form: it is sufficient "to state a cause or ground of action, good in substance." But that section—as is shown by its preamble, "With respect to the forms of action and the manner of commencing them"—deals with nothing but *forms* of action. It therefore applied only to cases in which the *right* of action had been left untouched; but did not revive the *right* to this action, which had been destroyed by section 3.

H. T. 1861.  
*Queen's Bench*  
 KEARNEY  
 v.  
 KEARNEY.

*O'Riordan*, contra.

The fifth section of the Common Law Procedure Amendment Act (*Ir.*), 1853, abolished technicalities, but did not destroy *rights* of action. The sixth section re-enacted the *right* to bring this action which sec. 3 had destroyed. Every *right* of action, which, prior to that Act, might have been maintained in a particular form, is, by section 6, given in a general form, devoid of all technicalities. The Common Law Procedure Amendment Act (*Ir.*), 1853, was never intended to take away any *right* of action; and, just as its 6th section re-enacted the right which section 3 had destroyed, so its 20th section re-enacted the period of limitation within which actions of account must be brought, but which had been left without limit,



H. T. 1861. because section 3 had repealed the limitation section (s. 17) of the  
*Queen's Bench* statute of *Anne*.

**KEARNEY**

**v.**

**KEARNEY.**

*Jellett*, in reply.

The Legislature intended to abolish this kind of action of account; for it repealed the statute which created the *right* of action, while it left in force all the statutes which regulate actions of account at Common Law. The short preamble to section 5 of the Common Law Procedure Amendment Act (*Ir.*), 1853, shows that the whole code, beginning with that section, was introduced merely to regulate *forms* of action, and not to revive *rights* of action, which not only did not exist at Common Law, but had been actually destroyed by a previous section of the same Act. No repealed statute has ever been revived by implication. Such a revival must be by express words. Besides, the 6th section of the Common Law Procedure Amendment Act (*Ir.*), 1853, deals only with forms; and the words "taking or detention," which occur in it, refer to actual manual possession, and not to the taking of the whole rent by a tenant in common, for he has a right to take the whole.

*Cur. ad. vult.*

**LEFROY, C. J.**

**Jan. 19.**

In this case, we are all of opinion that the action of account can be maintained; and that the demurrer taken by the defendant must be overruled. Before the passing of the Common Law Procedure Amendment Act (*Ir.*), 1853, which altered the mode of proceeding, there could have been no doubt that the action could have been maintained by one joint tenant, or tenant in common, against his co-tenant, as bailiff; but only under the statute of the 6 *Anne*, c. 10 (*Ir.*), s. 23. Then it is said that, since that section of the 6 of *Anne*, c. 10 (*Ir.*), is repealed by the Common Law Procedure Amendment Act (*Ir.*), 1853, section 3, the action of account cannot now be maintained in its present shape. It appears to me that whatever *right* to maintain the action existed, by whatever form of proceeding it could have been maintained before this late Act, that

by it the action of account can now be maintained *as to the right*; while, as to the form of the proceedings, it must be prosecuted by the mode of proceeding pointed out by the late Act.

H. T. 1861.  
*Queen's Bench*  
**KEARNEY**  
*v.*  
**KEARNEY.**

The statute 6 of *Anne*, c. 10 (*Ir.*), gave a right to maintain this action of account between joint-tenants and tenants in common; and, in particular cases and in a particular manner, against the co-tenant (as if he was the bailiff of the other) for receiving more than his just share and proportion of the rents and profits. That Act has been repealed by the 3rd section of the late Act; but it is only repealed by the very same Act which, in its 6th section, provides for the *rights* of action, and points out the way in which the *right* is to be asserted—namely, in the same way in which certain other personal rights, or rights of personal action, are to be maintained. Nay, it says, in express terms, in one of the sections (6), that the action may be maintained under this Act as a personal action, by the mode of proceeding by which the right to maintain all personal actions is to be asserted:—"The right to recover any debt or damages, or personal chattel, in respect of any matter of contract or of tort, or taking or detention," which theretofore could have been recovered by a proceeding to assert a right arising from a matter of account—the *right* to recover in an action of account shall still continue to exist—that the right may be asserted in an action such as the statute gives, which is clearly an object of the statute, from the whole of it taken together. Nobody can doubt, from the whole context, as well as from particular statements in it, that the object of the Act, so far from the purpose of destroying rights, was to facilitate and simplify the modes of asserting rights. And therefore, although, for the purposes of the Act itself, it became necessary to repeal that statute, 6 *Anne* (*Ir.*), c. 10, s. 23, *quoad* the mode of proceeding, with a view to substitute a more simple form than the old process, it re-enacted, *eo instanti*, that it repealed the statute of *Anne*, the *right* of action, qualified by a new mode of proceeding, by which it was to be asserted. We are of opinion, for these reasons—though perhaps I have not expressed them so fully as my learned Brothers may wish to do—that this

H. T. 1861. action of account can be maintained, and that the demurrer to the  
*Queen's Bench* plaintiff must be overruled.

**KEARNEY**

**v.**

**KEARNEY.**

**O'BRIEN, J.**

I am also of opinion that this action is maintainable, and that the defendant's demurrer to the fifth count of the summons and plaintiff should be overruled. The right of one tenant in common to bring such an action of account as the present, against another, was given by the 23rd section of the statute 6th *Anne*, c. 10, (*Ir.*), which provides "that actions of account may be brought by one joint-tenant or tenant in common against the other, as bailiff, for receiving more than his just share;" and the statute then prescribes the form of proceedings in such action. By that Act, therefore, the relation of principal and bailiff is established between the two joint tenants or tenants in common. Defendant, however, contends that such right of action was altogether taken away by the Irish Common Law Procedure Act 1853, section 3. But the object of that Act, as stated in the preamble, was "to simplify and amend *the course of procedure* as to process, practice, &c., so as to prevent substantial justice from being defeated, by reason of the variety of forms of action, &c.; and to consolidate the provisions of several statutes and rules of Court relative to such proceedings." And the preamble indicates no intention, on the part of the Legislature, to take away *the existing rights of action*, or to interfere with them further than as regarded the mode of proceeding by which such rights might be enforced. Such, then, being the object of the statute, as stated in the preamble, it is necessary for the defendant to establish that the right of action in question is clearly taken away by the subsequent provisions of the statute. The 3rd section (on which defendant relies) provides that "from and after the commencement of that Act, the several Acts, and parts of Acts, mentioned in Schedule A" (which includes, amongst others, said 23rd section of the 6th of *Anne*), "should be repealed." Now, even if we assume, as contended for by defendant, that this 3rd section (considered without reference to the subsequent provisions of the Act) should be construed as working a total repeal of said 23rd

section of the 6th of *Anne*, both as to the right of action in question and the mode of enforcing it, I think the effect of this 3rd section of the Common Law Procedure Act is materially varied by the subsequent 6th section, which provides that "the right to recover any debt or damages, or personal chattels, in respect of any matter of contract or of tort, or of taking or detention, which might have been *heretofore* the subject of any action of debt, covenant, assumpsit, account, &c., shall and may be enforced in actions to be called 'a personal action.'" Under the statute of *Anne*, the right of one tenant in common to recover against another, on the state of facts mentioned in this summons and plaint, was a right which, before the passing of the Common Law Procedure Act, 1853, might have been the subject of an action of account; and I think it therefore clear, that the demand in question is one which, in the words of the Common Law Procedure Act, section 6, "might have been *heretofore* the subject of an action of account, &c.;" and that, accordingly, such demand may, under that section, be enforced in "a personal action," according to the form of proceeding prescribed by that Act. It has been urged, by defendant's Counsel, that, as a general rule, if an Act of Parliament be repealed, it should be considered (except as to transactions passed and closed) as if it had never existed; and that, therefore, as the previous statute of *Anne* was repealed by the 3rd section of the Common Law Procedure Act, we should not give to the 6th section any greater effect than if such previous statute had never existed, and should not hold that the 6th section includes a right of action which existed only under the statute so repealed. The present case, however, is distinguishable from those in which that general rule has been applied. It is true that we should not depart from that rule upon mere speculation or conjecture as to the intention of the Legislature; but where an Act of Parliament, repealing various previous statutes, also provides, in general terms, for rights which existed while those previous statutes were in operation, and which were derived only under those statutes, then it is clearly the intention of the Legislature, and necessary for the purposes of the Act, that, instead of our deciding a question arising on those provisions,

H. T. 1861.  
*Queen's Bench*  
**KEARNEY**  
*v.*  
**KEARNEY.**

H. T. 1861.  
*Queen's Bench*

KEARNEY  
v.

KEARNEY.

as if such previous statutes had never existed, we should, on the contrary, refer to them for the purpose of ascertaining what were the previously existing rights to which the Legislature intended that those provisions of the repealing Act should apply. In the present case, the 6th section of the Common Law Procedure Act uses the word "*heretofore*," and thus refers and provides for rights existing while the statute of *Anne* was in operation. If, indeed, the word "*now*" had been used instead of "*heretofore*," a question might arise as to the difficulty of holding that a right derived only under a statute which was repealed by one section of an Act, could be considered as a right existing at the time of the passing of that Act, inasmuch as such right ceased to exist the instant of time that such Act was passed. But, as the 6th section of the Common Law Procedure Act is framed, I think it plainly contemplates and provides for all rights of action existing previous to the passing of that Act, and which would have continued to exist if that Act had not been passed.

It has indeed been further objected by Mr. *Jellett*, that, according to the terms of the 6th section, we should construe it as being confined to rights to recover any debt, damages, or personal chattel, *in respect of any matter of contract, tort, taking, or detention*; and not as including the right in question, which, having been solely derived under the statute of *Anne*, should not be considered as a right in respect of any matter of "contract." But a construction of the section has been suggested by one of my Brethren, which would remove that objection—namely, that it may be read as if there was a stop, or "comma," at the word "debt," so that the subsequent words "which might have been heretofore, &c.," would include "the right to recover any debt," without reference to its being "in respect of any matter of any contract, &c." The section would then run thus: "The right to recover any debt . . . "which might have been heretofore the subject of any action "of . . . account, shall and may be enforced, &c." I see nothing to prevent our reading the section in that way, if necessary for the purpose of carrying out the manifest objects and policy of the Act. It is also to be considered that an action of account,

before the statute of *Anne*, was considered as founded on the supposition of contract.—[See *Viner's Abridgment*, tit. *Account*, C. pl., 9]. The statute of *Anne*, in giving the action of account to one joint tenant or tenant in common against another, declares that the defendant may be considered as the bailiff of the plaintiff; thus establishing between the parties the relation of principal and bailiff, and giving ground for holding that such action might be maintained as an action of contract. It would follow from this that the 6th section, even if read as contended for by Mr. *Jellett*, would include the right of action in question. Without, however, going further into these details, I think we should decide this case for the plaintiff, upon the plain ground that the Common Law Procedure Act professes to deal with, and to simplify, *the course of proceeding and forms of action, &c.*, and does not profess to take away then existing *rights of action*; and that, accordingly, we should not give it a construction which would take away the previously existing right to recover a just demand, except we are required to do so by the clear and unambiguous provisions of the Act.

With respect to the alleged inexpediency of bringing this action at Law instead of proceeding for an account in Equity, the case of *Wheeler v. Horne* (a), to which we have been referred, affords an illustration of the contrary. In that case, even under the mode of proceeding at Law, given by the statute of *Anne*, an account was taken in two years, which appeared to have occupied twelve years in Chancery. Besides, under the Common Law Procedure Act of 1856, Courts of Law have now the power of referring matters of account to the Master, which would much simplify the proceedings.

It was admitted by defendant's Counsel, in the argument, that our decision against defendant, on his demurrer, would also rule the question on the demurrer taken by plaintiff to defendant's fourth defence to the fifth paragraph of the summons and plaint. I think, therefore, that plaintiff is entitled to judgment on both demurrers.

HAYES, J.

I am of the same opinion, and have come to it on two short grounds:—First, it was no part of the policy of the Common Law

(a) Willes, 208.

H. T. 1861.  
*Queen's Bench*  
KEARNEY  
v.  
KEARNEY.

H. T. 1861.  
*Queen's Bench*

KEARNEY

v.

KEARNEY.

Procedure Amendment Act (*Ir.*), 1853, to interfere with the right of action which the subject had. That statute dealt with remedies, and not with rights. Secondly, I am of opinion that, apart from the policy of the Act, the words of the 6th section, taken in their natural acceptation, are quite sufficient to preserve the *right* of action which previously existed, whether it existed at Common Law or was given by statute; whether it was to be pursued by action of account, or by the equitable action of money had and received.

FITZGERALD, J.

I also am of opinion that the demurrer to the plaint should be overruled, and that the demurrer to the defence should be allowed, for the reasons stated by the LORD CHIEF JUSTICE. The groundwork of the opinion which I have formed is very simple. The statute of the 6 *Anne*, c. 10 (*Ir.*), s. 23, appears, in terms only, to give to one joint tenant or tenant in common a specific right of action against his co-tenant. Yet, in reality, that statute did two things; it created a *right* of action by one joint tenant or tenant in common against his co-tenant, as bailiff, which did not exist at Common Law, unless in the case of an actual appointment of one of them by the other as his bailiff; and it gave, as a remedy for enforcing that *right* of action, an action of account—a qualified action of account, not that at Common Law, but one in which auditors were to be appointed by the Court, to ascertain how the account stood; and, on ascertaining the balance of that account, if they found that the balance was against the defendant, then final judgment, as for a debt, for the amount of that balance, should be entered up against him. The statute, therefore, created a right, and gave a remedy to enforce it. We must see, then, how the Common Law Procedure Act (*Ir.*), 1853, operated on that enactment. If its 3rd section was to be read as a total repeal, out and out, of the statute of *Anne*, I should have entertained some doubt; for it has been held that, in construing a repealing statute, the Court must construe it as if the statute which is thereby repealed *in toto* had never existed. In *Surtees v. Ellison* (a), Lord Tenterden, C. J.,

(a) 9 B. & Cr. 750.

said :—"It has long been established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." Now, that was the opinion of Lord Tenterden, delivered when construing other provisions of an Act which repealed a former Act, and he held that the Court must decide the case as if the former Act "had never existed;" and in *Simpson v. Ready* (a), the Court of Exchequer held the same. Such is the general rule of construction on this subject. Now, these cases were pressing on my mind, and would have created some doubt in it if the Common Law Procedure Act (*Ir.*), 1853, had repealed, out and out, the statute of *Anne*. But I think the 3rd section does not work a total repeal of the statute of *Anne*. It repeals the Acts and parts of Acts, "so far as the said Acts or parts of Acts relate to personal actions or actions of ejectment in the Superior Courts of Law in Ireland, and no further or otherwise." I adopt the view expressed by my LORD CHIEF JUSTICE, that the general intention of the Common Law Procedure Act was to regulate procedure, and remedy, but not to interfere with or take away any right of action. It did interfere with the forms of actions; and its general intention was, not to take away rights, but to simplify the remedies for enforcing those rights. My reading of the 3rd section is, that it repeals the statute of *Anne* so far as related to the form of action and procedure, but that the *right* of action was left untouched. That construction frees the question from all difficulty. But supposing that the construction of the 3rd section was to be larger, and that it worked a total repeal of the statute of *Anne*, I would still arrive at the same result, though with doubt; for it does seem strong to hold that the statute of *Anne* is re-enacted by the 6th section of an Act, the 3rd section of which had wholly repealed it. The 6th section of the Common Law Procedure Act must be read thus :—"The right to recover any debt . . . which might have been heretofore the subject of any action of . . . account," that *right* may still "be enforced in an action to be called a personal action;" and these words are large enough to re-create the right of action given

H. T. 1861.

*Queen's Bench*

KEARNEY

v.

KEARNEY.

(a) 11 Mee. &amp; W. 346.



H. T. 1861.  
*Queen's Bench*

KEARNEY  
v.

KEARNEY.

by the statute of *Anne*. Look at it in what light you may, that action was, in its final result, an action for a debt, which debt was to be ascertained upon a balance of an account, which was to be followed up by a judgment for the plaintiff as for a debt. Taking that view of the 6th section, it would be sufficient to maintain the plaintiff's demand. But I prefer to rest my judgment upon the ground that the 3rd section has worked only a partial repeal of the statute of *Anne*; and for these reasons the demurrer taken to the plaint must be overruled.

M. T. 1860.

Nov. 5.

H. T. 1861.

Jan. 18, 19,  
28.

EDWARD ROCHFORD v. MATTHEW ENNIS.

A lessee sub-demised lands at the clear yearly rent of £214. 8s. 4d., which the Court of Chancery, in a subsequent suit, reduced to £142. 6s. 9½d. "until further order." Afterwards, the Commissioners of the Incumbered Estates Court sold the fee-simple of the lands discharged of the head lease, and conveyed them to the purchaser, subject to the sub-lease "made to, &c., at the yearly rent of £142. 6s. 9½d., payable, &c."

In pursuance of the provisions of the Common Law Procedure Amendment Act (*Ir.*) 1863, s. 92, the parties to this action stated a special case for the opinion of this Court. The case was argued in Michaelmas Term 1860, when the Court directed that the special case should be amended. The case, as amended, was re-argued during the present Term. The material facts and documents are stated at length in the judgment of FITZGERALD, J. The lands were sold under the annexed rental; \* and the real question, on which the parties desired to have the opinion of the Court, was whether the plaintiff was entitled to recover the full rent reserved by the lease of the 10th of April 1841?

*M. O'Loghlen* (with him *S. W. Flanagan*), on behalf of the plaintiff, contended that the abatement made in the rent by the order of the Court of Chancery was only a temporary abatement: *Hamilton v. Nagle(a)*. When an instrument recites erroneously the

The Court was divided in opinion on the question, whether the purchaser was entitled to the yearly rent of £214. 8s. 4d., or to the abated rent only?

(a) 1 Ir. Chan. Rep. 513.

\* See opposite page.

M. T. 1860.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

LOT 6.

No. on Map.	Denomination	Tenant's Name.	Gale Days.	Quantity of land, English Statute Measure.	Yearly Rent.	Rentcharge.	Total Rent and Rentcharge payable by the Tenant.	Tenant's Tenure.
7 to 8, 4	Curraghtown	Mathew Ennis	25th March and 29th September	A R P 126 0 30	£ s d 148 2 9½	£ s d 5 16 0	<div>Deduct Tithe Rentcharge    £                   s                   d 148 2 9½ 5 16 0 <hr/>Net Annual Value £142 6 9½</div>	Lease, dated 10th of April 1841, for a life since deceased, or 21 years from 25th March 1842, at the rent of £214 8s. 4d. This rent was reduced by the Court of Chancery to the sum stated in the rental.

M. T. 1860.  
*Queen's Bench*  
**ROCHFORD**  
*v.*  
**ENNIS.**

contents of a prior instrument, which is identified, the erroneous recital does not bind the parties, but is to be corrected by reference to the original instrument. Therefore, the erroneous recital of the rent, in the deed of conveyance to the plaintiff, must be corrected by reference to the lease of the 10th of April 1841: 2 *Shep. Touch.*, by *Prest.*, 7th ed., p. 247; *Burt., R. Pr.*, 8th ed., p. 183; *Llewellyn v. The Earl of Jersey* (a). The 12 & 13 *Vic.*, c. 77, does not contain any provision which exempts a conveyance from the Commissioners from the operation of the general rule; and its sections (23, 24, 27) do not empower them to sell lands subject to a condition not contained in the lease subject to which the lands are sold. Their power, in ascertaining the terms of such leases, is ministerial only. The only party estopped by a deed-poll is the grantor: *Co. Lit.* 47, b; *Shelf. R. Pr.*, p. 331; *Lewis v. Willis* (b). The mis-statement in the conveyance cannot bind the purchaser: *Booth v. Daly* (c); *Bradford v. The Dublin and Kingstown Railway Company* (d).

*Owen* and *J. E. Walshe*, on behalf of the defendant, contended that the Commissioners had jurisdiction to sell the estate at a rent different from that reserved in the lease subject to which they sold the land. The duty of the Commissioners, as prescribed by the 12 & 13 *Vic.*, c. 77, ss. 15, 23, 27, 49 and 51, read together, is to inquire into the dealings between the parties to the lease, and to ascertain and adjudicate upon its terms. Their adjudication is final, and binds the purchaser.

Secondly.—The Court cannot look at any evidence except the deed of conveyance itself, which is conclusive evidence that all acts which the Commissioners ought to do have been done by them: *Errington v. Rorke* (e).

Thirdly.—Upon the true construction of the deed itself, the Commissioners have sold the estate subject to the payment of the lesser

(a) 11 M. & W. 183.

(b) 2 Wils. 314.

(c) 6 Ir. Com. Law Rep. 460.

(d) 7 Ir. Com. Law Rep. 57, 624.

(e) 9 Ir. Com. Law Rep. 357.

rent only: *Broom's Legal Maxims*, p. 562; *Morrell v. Fisher* (a); *H. T. 1861. Boyle v. Mulholland* (b). *Queen's Bench*

## [SECOND ARGUMENT].

*Flanagan*, for the plaintiff.

ROCHFORD

v.

ENNIS.

Jan. 18, 19.

The first question is, what were the duties and what the powers of the Commissioners, with reference to tenants' leases, under the 12 & 13 Vic., c. 77? They have no jurisdiction to alter any of the terms of a lease subject to which they sell and convey an estate to a purchaser. The statute (section 23) defines minutely their jurisdiction, and the acts they are to do in reference to tenancies, leases or under-leases, which affect the land or lease which is to be sold. The main object of the statute was to give purchasers a parliamentary title, namely, in reference to fee-simple estates—a title indefeasible, and not to be questioned by any person whatsoever; and, in reference to leasehold estates, a title indefeasible so far as that leasehold estate was originally well created, and no further; for their conveyance only discharged it from estates which intervened between that conveyance and the instrument which created the estate. Where the estate to be sold is a leasehold, the only duty imposed on the Commissioners is the ascertainment of the under-leases. To that end, they are directed to do certain enumerated acts, which merely enable them to ascertain the actually existing rights of the under-tenants, and to secure them in the enjoyment of those rights, but not to confer rights which they had not before. The duty is simply ministerial—to ascertain, as matters of fact, the under-leases and their terms, and then to sell the leasehold subject to the leases so ascertained, and unaltered in any particular. The under-tenants, on their part, are required to “produce all leases, under-leases, and agreements in writing, under which” they “occupy or claim to hold,” to the Commissioners, in obedience to notices served on them. The words “lease,” “under-lease,” in the 23rd and 24th sections, have a limited signification; they mean, “the very instruments “which create the relation of landlord and tenant, and fix the rent “and the other terms of the tenancy or under-tenancy.” Section 27 incorporates into itself that definition by the words “as aforesaid,”

(a) 4 Exch. Rep. 591.

(b) 10 Ir. Com. Law Rep. 150.

H. T. 1861. *Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

which refer to section 24. The estate cannot be sold discharged from such a lease. The next branch of section 23 is the only part of it which confers on the Commissioners even a qualified judicial character; it enables them to ascertain whether such a lease was granted *bona fide*; and, if they think it was, to sell the estate subject thereto. Section 27 gives the Commissioners the most absolute discretionary jurisdiction to sell the estate discharged from any lease whatever: but it does not confer on them a greater jurisdiction as regards leases, subject to which they sell, than they acquired under section 23. If the Commissioners alter or vary any term in a lease, subject to which they sell an estate, their act does not acquire any validity by reference to the words of the 27th section; the effect of which is simply to protect purchasers from leases which are not referred to in the conveyance; and purchasers are not bound by leases referred to in it, except so far as the estate had previously been bound thereby. It will be contended however that the Commissioners have jurisdiction to abate the rent, or to confirm an abatement already made, and so to ascertain and secure the rights of the tenant, and ascertain his tenancy; that is to say, the terms of his tenure, as a matter of fact; but, in respect to the power of alteration, there is no difference between the rent and any other term of the lease. Therefore, if they have jurisdiction to alter the rent reserved by a lease, they have, by parity of reasoning, jurisdiction to alter any other term of it; in other words, to declare and recite in their conveyance that the lease subject to which they sell the estate comprises two, three or more denominations of land, though in point of fact it comprises only one denomination; which is absurd: nor can they do indirectly what they are not empowered to do directly. If on the lease itself there appears an indorsement which operates as a legal abatement of the rent, or if, by a separate instrument under hand and seal, the rent has been reduced, or extinguished *pro tanto*, the Commissioners, although they have not jurisdiction to sell the estate subject to the leases at that abated rent, may ascertain the fact of the abatement, and leave the tenant and the purchaser free to deal with it according to law. A plaintiff who claims under a conveyance from the Commissioners is not

estopped from questioning their authority; because their conveyances are only deeds-poll, which have no force except what they derive from the statute.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

The second question relates to the construction of the conveyance itself. The rent reserved by the lease of the 10th of April 1841 is erroneously described in the conveyance. The doctrine of *falsa demonstratio* does not apply to this case, for it never applies when it is possible to find something in *rerum naturâ* which will satisfy the description: *Boyle v. Mulholland* (a). Here, the identity of the lease and of the rent being admitted, the sole question is, what is the operation of the conveyance which purports to state the terms contained in the lease? The word "made," governing the construction of the whole description, applies to the rent as well as to the grantee. Therefore, the statement of the rent is plainly a mistake; because in fact the lease was made at a higher rent, and the description purports to describe the very terms of the lease. There is nothing in the conveyance whence it can be inferred that the statement of the lesser rent was designedly introduced to show that the higher rent had been permanently abated. The mis-statement does not bind the plaintiff, and is corrected by the incorporation in the conveyance of the lease itself, which enables the Court to set the mistake right by comparison. If the intention was to state the rent at which the tenant *then* held the lands, the description would have run thus:—"Made . . . at a yearly rent of £214. 8s. 4d., which has been reduced to £142. 6s. 9½d." The phrase "at the yearly rent" is merely equivalent to "reserving a yearly rent," which is quite consistent with the plaintiff's construction of the conveyance. Had the words been "yielding and paying," the Court might, contrary to the fact, have assumed that the rent so mis-stated was the very rent originally reserved. In *Booth v. Daly* (b), the schedule stated that there had been an abatement made; and the only question to be argued was whether, on account of the manner in which the abatement was expressed, it was to be considered as a permanent abatement, or as one merely temporary? But, even granting that the Commissioners have the enormous jurisdiction

(a) 10 Ir. Com. Law Rep. 160.  
 VOL. 13.

(b) 6 Ir. Com. Law Rep. 460.  
 42 L

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

claimed for them by the defendant, they have not in fact exercised it. They have not assumed to convey the estate at the abated rent. One column of the rental was headed "total rent and rentcharge payable by the tenant." The word "payable" is satisfied by reference to the rent payable *at that time*; and does not mean the rent payable then, and to be paid for the future until the end of the term. Payable at that time is a true description of the abatement made by the Master of the Rolls, which would not have bound any person after the determination of the suit in which it was made; so that, except for this mis-statement, the purchaser might, immediately after the execution of the conveyance to him, have enforced on the defendant payment of the higher rent. The observation in the last column of the rental, "this rent was reduced by the Court of Chancery," shows that the reduction intended by the Commissioners was only the temporary one which had been made by the Master of the Rolls. Everybody knows that a reduction made by the Court of Chancery in a suit is of a temporary nature; whereas in *Booth v. Daly* it was not stated that the abatement had been made *by the Court of Chancery*; and therefore was, for the purposes of the argument, assumed to have been made in some one of the other modes which the law recognises as making a permanent reduction effectual. *Booth v. Daly* was therefore a much stronger case for the defendant. In the present case, had the rental been incorporated in the conveyance, the temporary nature of the abatement could not have been questioned. Therefore, in both points of view, upon the construction of the 12 & 13 Vic., c. 77, and upon the construction of the conveyance itself, the plaintiff is entitled to recover the full rent reserved by the lease of the 10th of April 1841.

*J. E. Walshe*, for the defendant.

The Commissioners, when asked to give Dopping's creditors the benefit of sweeping away the lease of 1832, did so upon the equitable terms that those creditors should take the benefit, subject to the liabilities of Bateman the lessee. The Commissioners had jurisdiction to make that order, under the 12 & 13 Vic., c. 77, s. 36. At all events their jurisdiction cannot now be questioned:

*Errington v. Rorke* (a). The 23rd section is not the only one which confers on the Commissioners judicial power with respect to a sale. Section 15 gives them, in respect to a sale, the jurisdiction of a Court of Equity. Under that section, when a document is produced to the Commissioners which establishes a reduction, or an equitable right to a reduction of the rent, they are authorised to inquire into the matter; and to sell the estate subject to such rights as they think the tenant is entitled to. The 23rd section goes far beyond the 15th; and, omitting all reference to the Court of Equity, gives them an unlimited power, as to *bona fide* tenancies, to ascertain *all* the terms of the tenancy. The word "tenancy" includes not only the original document which created the tenancy, but also every other document which has subsequently varied the terms of the tenancy; *per* Perrin, J., in *Booth v. Daly* (b). They have a right to act as if they were the landlords, and therefore to continue the abatement which had been made by the Court of Chancery, not pending the suit merely, but "until further order." The only appeal from their decision lies to the Privy Council. Such a power was necessary to carry out the policy of the 12 & 13 Vic., c. 77, and the order confirming the abatement need not be made by any instrument prior to the conveyance itself.—[FITZGERALD, J. Then no person would have an opportunity to appeal from their decision.]—The Court must presume everything necessary to support the conveyance: *Errington v. Rorke*. And the purchaser, who says he is injured by the abatement, never could have appealed from any prior order, because his rights had not then come into existence. Either of the parties interested might have appealed from the settlement of the rental, in which the fact of the abatement was stated. That statement shows that the intention was to sell the estate at the abated rent, which abatement was to last until the expiration of the lease. Section 27, by enacting that the conveyance shall be effectual to pass the fee-simple, subject to the lease, but "discharged from all former and other estates, *rights*," &c., assumes that the Commissioners had acquired this jurisdiction from the previous sections. So, this was a sale of the estate, subject to the lease of

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

(a) 9 Ir. Com. Law Rep. 357.

(b) 6 Ir. Com. Law Rep. 469.



H. T. 1861.  
*Queen's Bench*  
**ROCHFORD**  
*v.*  
**ENNIS.**

the 10th of April 1841, but discharged from the *right* of any person in the cause of *White v. Bateman* to apply to the Court of Chancery to alter or rescind its order abating the rent. The first Incumbered Estates Court Act (11 & 12 *Vic.*, c. 48), gave only the limited jurisdiction now asserted by the plaintiff. But the 12 & 13 *Vic.*, c. 77, greatly extended that jurisdiction: *per* Richards, B.; *Errington v. Rorke* (a). In *Booth v. Daly*, it was assumed, and not controverted, that the Commissioners had power to alter the amount of the rent.

On the second question, as to the construction of the conveyance, it may be conceded that the doctrine of *falsa demonstratio* does not apply to the present case. But the Court must not omit any word from a deed, which it is possible to construe so as to give effect to every word in it. The plaintiff contends that the Court must strike out of the conveyance all the words which purport to describe the rent, because upon reference to the lease of 1841, it appears that the description of the rent is inaccurate. On the contrary, the Court must, if that be possible, give a meaning to every word in the conveyance, which is to be treated as describing a tenancy created partly by the lease and partly by other documents of which the Court knows nothing, and concerning which it cannot make any inquiry. The Court must, if to do so be necessary to support the conveyance, presume that the lease to which it refers is different from the lease which reserved the rent of £214. 8s. 4d. It does not appear that the Commissioners meant to describe any lease. For a conveyance always describes a lease by naming the parties to it. That has not been done here. The inference to be made is, that they meant to describe, not the lease granted by Bateman and Jones, but some tenancy created by other persons. Grammatically, it is impossible to read the words—"subject to a certain indenture of "lease thereof made to W. J. Darcy, and dated the 10th day of "April 1841, for a life," &c.—as the plaintiff wishes, because a lease cannot be "dated . . . for a life." The rent reserved is the only term stated with marked particularity, and the plaintiff requires the Court to strike it out. The Commissioners, seeing that it was

(a) 6 Ir. Com. Law Rep. 324.

a fluctuating rent, determined to settle it permanently. That the insertion of the smaller, instead of being a mistake, was a deliberate act is plain; because it is stated, not in round numbers but with precision, even to a half-penny. They were right to adjust the rent permanently, because no "further order" could be made after the sale. In *Booth v. Daly* the instrument was identified. The lease here is not identified; and the language of this conveyance shows that the abatement was to be permanent, for it was to be "payable yearly and every year." The printed epitome used at the sale mentions the lesser rent only.

H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

*Cur. ad. vult.*

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FITZGERALD, J.

In this case of *Rochfort v. Ennis*, which was argued before us on the 5th of November 1860, and afterwards, upon the amended case, on the 18th and 19th of January 1861, it appears, from the papers before us and from the pleadings, that the action was brought to recover the sum of £670. 10s. 11d., the arrears of rent alleged to be due by the defendant to the plaintiff, out of the lands of Curraghtown, under a lease bearing date the 10th day of April 1841, and made by Edward Bateman and John Copeland Jones to William James Darcy. The action is in covenant, upon that lease; and the plaintiff claims to be assignee of the reversion, and the defendant is assignee of the lessee's interest. The lease of the 10th of April 1841 is an ordinary lease, made between landlord and tenant, and containing the ordinary reservations, and a covenant to pay the yearly rent of £214. 8s. 4d. It appears further that, by an order of the Court of Chancery, which was made in a certain matter then pending in that Court, and in which J. White was petitioner and E. Bateman was respondent, a receiver was appointed over the lands of Curraghtown; and by an order of the Master of the Rolls, made in that matter and in certain other matters, and bearing date the 26th of November 1849, the rent was reduced to the sum of £148. 2s. 9½d., which reduced rent the receiver was thereby ordered to receive in lieu of the higher rent, "*until further order.*" The question between the parties is—Whether, under the circumstances

Jan. 28.

H. T. 1861. stated in the case, the defendant, the tenant, is liable to pay the whole rent of £214, 8s. 4d., or is only liable to pay the abated rent? If he is liable to the abated rent only, our judgment must be given for him; but if he is liable to pay the full rent, then a balance remains due and payable by him to the plaintiff.

*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

The action was to have been tried before my LORD CHIEF JUSTICE, at the sittings after Hilary Term 1860; but, before it was called on, the parties entered into a consent, whereby it was agreed to state the facts in the form of a special case, upon which, and upon the pleadings, the Court might deliver its judgment. From the case stated, it appears that Anthony John Dopping was seised in fee of the lands of Curraghtown, and, being so seised, made a lease of those lands, bearing date the 1st of June 1832; but, as subsequently appeared, his estate was then subject to prior mortgages and incumbrances. The lease of 1st June 1832 was made to Edward Bateman and his heirs, for three lives, at the yearly rent of £105. 16s. 0d., with a covenant for perpetual renewal. The special case then states that afterwards all the estate and interest of A. J. Dopping, in the said lands, became vested in Samuel Dopping; and that the estate and interest of E. Bateman became vested in E. Bateman and J. C. Jones. J. C. Jones was mortgagee of the lessee's interest; and I find that E. Bateman and J. C. Jones, in whom the lessee's interest had become vested, joined in making the lease dated the 10th of April 1841, to W. J. Darcy, for the lessee's life, or twenty-one years, at the clear yearly rent of £214. 8s. 4d.; but the covenant to pay the rent is made to E. Bateman, his heirs and assigns, and not to J. C. Jones. Upon this latter lease, the action has been instituted, and the present question arises. That lease was made to W. J. Darcy on the 10th of April 1841; and it is stated in the special case, that, some time in the year 1846, all the estate and interest of W. J. Darcy, by mesne assignments became vested in the defendant Matthew Ennis, who thereupon entered into possession of the said lands of Curraghtown, under that lease of the 10th of April 1841, and still continues in possession of them under that lease, *but at what rent it is for the Court to determine*. It is important to bear in mind

H. T. 1861.  
*Queen's Bench*  
**ROCHFORD**  
 v.  
**ENNIS.**

that it is an uncontroverted fact that the defendant is assignee in possession of the lands under the lease of the 10th of April 1841, and now holds possession of the lands under that lease. The special case then proceeds to set out the order under which the rent was abated. It is an order of the Court of Chancery, made by the Master of the Rolls, and bearing date the 26th of November 1849; and from the recitals in that order it appears that a receiver had been appointed over the interest of E. Bateman, the landlord in the lease of the 10th of April 1841, and it was ordered that "the said yearly rent of £214. 8s. 4d." (that is, the rent reserved by the lease of the 10th of April 1841), "then payable by the defendant, as "tenant to the said lands of Curraghtown, be reduced to the sum of "£148. 2s. 9½d., being £142. 6s. 9½d. rent, and £5. 16s. 0d. tithe "rent-charge; and that the said receiver do receive such reduced "rent in lieu of the said sum of £214. 8s. 4d., *until further order.*" I have called attention to this order, and especially to its concluding words, because the defendant relied strongly on the fact that the order does not show what the nature of the abatement was. But no one can doubt that it was one of those temporary orders, made in the progress of a case, not for the purpose of enforcing equities between the parties, but when it appeared that the tenant was unable to pay his rent. The effect of these orders is now quite settled; and upon that subject I need only refer to the elaborate judgment of Master Murphy, in the case of *Byrne v. Kelly* (a), the principles laid down in which were adopted by the Lord Chancellor, in his judgment in the case of *Hamilton v. Nagle* (b). From these cases, it is quite clear that the Court of Chancery has not, and never had, any jurisdiction to discharge the tenant from the obligation of his covenant—to relieve him from his covenant to pay the rent reserved in his lease. It may, with the assent of the parties, make an order to abate the rent, pending the cause. But once the cause has ceased to exist, or the parties have withdrawn their consent, the Court of Chancery has no authority to restrain the inheritor from recovering his rent. Again, in *Booth v. Daly* (c),

(a) 3 Ir. Jur. 177.

(b) 1 Ir. Ch. Rep. 513-17.

(c) 6 Ir. Com. Law Rep. 460.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

Crampton, J., said :—"Further, this reduced abatement was made  
 "by order of the Court of Chancery, and it has never been held that  
 "such would bind the landlord when he resumed the possession."  
 So far, then, we have ascertained, by authority and by the nature of  
 the case, what the effect of one of these temporary orders was ; and  
 there is no doubt, from the statement here, that this was merely a  
 common order to abate the rent *until further order*.

The special case then proceeds to state that, on the 24th of  
 December 1849, a petition was presented to the Commissioners for  
 the Sale of Incumbered Estates in Ireland, in the matter of the  
 estate of Samuel Dopping, owner, *ex parte* W. P. Hoey, petitioner.  
 That petition was presented by Hoey against S. Dopping, who  
 represented the party who made the lease of the 1st of June 1832,  
 and who was the owner of the fee, subject to the incumbrances ;  
 and in it the petitioner prayed, amongst other things, for a sale of  
 the fee of the lands in question. And it appears, from an examina-  
 tion of that petition, and from the subsequent statement of facts,  
 that there were charges upon the fee prior to the lease of the 1st of  
 June 1832, some of which were vested in the petitioner ; and upon  
 referring to the amended statement of the special case [Exhibit A,  
 schedule L, denomination 12], we find Bateman's lease, of the 1st of  
 June 1832, set out as a lease for three lives renewable for ever, at a  
 rent of £105. 16s. 0d., and this observation is appended :—"This  
 "tenant paid a fine. The rent is under the value ; and it may be  
 "necessary, for the protection of the prior creditors, to sell discharg-  
 "ing of this lease." Accordingly, a conditional order having been  
 made upon that petition, an absolute order for the sale of the fee  
 was made on the 17th of January 1850. On the 19th of February  
 1850, the petitioner's solicitor filed a statement of facts, which is  
 also set forth in the amended case ; and from that statement of facts  
 it appears "that the said A. J. Dopping, in consideration of  
 "pecuniary fines, made two several leases, for lives renewable for  
 "ever ; one bearing date the 1st day of June 1832, to E. Bateman,  
 "since deceased, of part of the land of Curraghtown, containing  
 "126a. 0r. 30p., or thereabouts, English statute measure, at the  
 "yearly rent of £105. 16s. 0d. ;" and concluding with this state-

ment: "under both of which said leases the tenants have valuable interests; and, said leases being subsequent to charges affecting the estate to a very large amount, it may become necessary, for the protection of the creditors prior thereto, to sell discharged of said leases; and your petitioner's solicitor requests instructions as to whether or not he should serve any notices on the parties claiming under said leases, or how he should act in relation thereto." Pending these proceedings, a petition had been presented to the Commissioners of the Court for the Sale of Incumbered Estates, at the suit of J. C. Jones, for a sale of Bateman's interest in the lands of Curraghtown, and, on the 31st of January 1850, a conditional order for the sale of it was made; so that there were then two petitions pending, one of which prayed for the sale of the fee-simple, and the other prayed for the sale of Bateman's interest under the lease of the 1st of June 1832. A petition, which was founded on a further statement of facts, and in both matters, having been presented to the Court, it was, on the 19th of February 1850, entertained by the Commissioners, who ordered that, as regarded the two leases, the petitioners should be at liberty to proceed, under the 12 & 13 Vic., c. 77, sec. 36, and consolidate the matters; and, in pursuance of that permission, a petition was presented in the two matters. It was intituled, "In the Matter of the Estate of Samuel Dopping, owner; *ex parte* W. P. Hoey, petitioner. John Bateman, owner; *ex parte* J. C. Jones, petitioner." On the 20th of March 1850, a conditional order was made in that consolidated matter. On the 13th of April 1850, that conditional order was made absolute; and it was thereby ordered "that the lands demised by the lease bearing date the 1st of June 1832, in the supplemental petition in these matters mentioned, from A. J. Dopping to E. Bateman—that is to say, 126 acres and 31 perches of the lands of Curraghtown, shall be sold in these matters discharged of the said lease, such sale to be without prejudice to the rights of the parties interested in the said several estates respectively, in relation to the purchase-money arising from the sale thereof, shall be sold, for the purpose of discharging the incumbrances thereon." That order having been pronounced, and in pursuance of the 13th General Order of the

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

Incumbered Estates Court, a notice was served on Matthew Ennis, the defendant, as tenant then in possession of the lands of Curraghtown, and on the representatives of E. Bateman; and it is of some importance to observe that that notice, given to Matthew Ennis, the defendant, in whom the sub-lessee's interest had become vested, was a notice describing M. Ennis as "holding the said lands as tenant from year to year, at the yearly rent of £105. 16s. 0d." It would seem that the petitioner was ignorant of the nature of Ennis's interest; therefore, in the notice, he described Ennis's interest as of the lowest character, leaving it for the tenant to come in and disclose what his real interest was. Had the lands been sold discharged of that lease, the Court had authority to do so. That notice having been given to the tenants, a rental was prepared as the foundation of the sale, and is set out in the special case. It describes the holding correctly, and states the yearly rent as £148. 2s. 9½d., and the tithe rentcharge as £5. 16s. 0d., and the net annual rent as £142. 6s. 9½d. But then follows this observation: "Tenant's tenure—Lease dated the 10th of April 1841, for a life (since deceased) or 21 years from the 25th of March 1842, at the yearly rent of £214. 8s. 4d." That is a perfectly correct description of the lease in question—correct *in omnibus*; and then follows this observation: "This rent was reduced by the Court of Chancery to the sum stated in the rental." That description is perfectly accurate, and it states in substance—nay, actually refers to the order—that the rent reserved is £214. 8s. 4d., but that that sum has been abated by the Court of Chancery to the sum stated in the rental. That statement was inserted to prevent any complaint on the part of the purchaser. The duty of the Incumbered Estates Commissioners was to ascertain and state the tenant's tenure; and this circumstance of the abatement was mentioned to put the purchaser on his guard. The Court did put him on his guard, because it adverted to the order of the Court of Chancery, whereby the rent had been reduced. When one comes to look at that statement, coupled with the case of *Booth v. Daly*, it seems that if that rental had been incorporated with the conveyance, and if that statement had been at the foot of the conveyance in this case, it would have

been identical with the case of *Booth v. Daly*; and, interpreting the conveyance by reference to the order of the Court of Chancery, it would have been found that the abatement was, in its nature and terms, temporary; and the Court would have been coerced to come to the same decision as it came to in *Booth v. Daly*.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

The defendant here relies further on, and has set forth, that on the occasion of the sale, what is called a private epitome was used: it is in these words: "Lot 6—The fee and inheritance of that "part of the lands of Curraghtown, containing 126 acres and 31 "perches, held by Matthew Ennis under a terminable lease, and "*producing* the yearly rent of £142. 6s. 9d." It does not say that the lands are held *at* that rent; or that that is the rent reserved under the lease of the 10th of April 1841; and I read it thus—"that it is held under a terminable lease as then," that is to say, at the time of the sale, "*producing* the yearly rent of £142. 6s. 9d." With the aid of these two documents, the sale was proceeded with, and took place on the 21st of June 1850; and the special case states that E. Rochfort, the plaintiff, became the purchaser of the said lands, and that the same were conveyed to him by a deed of the 19th of August 1850, duly executed by the said Commissioners. The plaintiff therefore acquired the fee discharged from the lease of the 1st of June 1832, but subject to the sub-lease of the 10th of April 1841, under which the defendant still holds possession. The effect of the sale of the fee-simple of the lands discharged of the intermediate interest, but subject to the lease of the 10th of April 1841, was to give the plaintiff the same rights, as against the defendant, as if he had purchased the reversion immediately expectant on the lease of the 10th of April 1841. If it were not for the 5th section of the third Continuance Act (16 & 17 Vic., c. 64), there might have been a very considerable practical difficulty in the way of the plaintiff; because, as he is purchaser of the fee-simple of the lands, discharged of the lease of the 1st of June 1832, but subject to the lease of the 10th of April 1841, it might have been argued that he had not acquired the immediate reversion expectant on the lease of the 10th of April 1841; that it was merged, and that therefore he had no



H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

right to sue upon it; but the 16 & 17 Vic., c. 64, s. 5, saves him from that difficulty. That enactment was passed to save purchasers in the Incumbered Estates Court from the necessity of stating their title, or how it became vested in them. The 5th section runs thus:—"Where any conveyance or assignment has "been made before the passing of this Act, or shall hereafter be "made by the Commissioners, subject to any lease, under-lease "or tenancy, such conveyance or assignment shall be deemed to "afford conclusive proof that the estate or interest purporting to "be conveyed or assigned thereby is the reversion expectant upon "such lease, &c.; and it shall not be necessary, in any action "arising out of or connected with such lease, &c., or in any "pleadings in such action, to allege or prove the title of such "reversion prior to the said conveyance or assignment." The construction which I put upon that section saves the plaintiff from all technical difficulty, and gives him the same right to sue upon the lease of the 10th of April 1841 as if he had purchased the reversion immediately expectant on that lease; and if there was no more in the case, the rights of the parties would be clear, and free from doubt. Immediately upon the sale, if followed by a conveyance, the order of the Court of Chancery would have ceased to have any effect; and the plaintiff might, if he thought fit to do so, have continued to receive the abated rent; or he might have enforced the payment of the larger rent. It is to be observed that up to this time the tenant Matthew Ennis has not been found to have intervened in the Incumbered Estates Court; he was however served with a notice; and the parties having the carriage of the proceedings for the sale of the lands having most probably got notice that there was a sub-tenant who claimed under a lease, then his title came to be discovered. It is further observable that, up to this period, the defendant does not point to any one act or order of the Incumbered Estates Court reducing the rent. The argument stood over since last Term, in order that the case should be amended, and made more precise. All the proceedings, up to the time of the conveyance from the Commissioners, have been brought before

us; and no act or order of their's reducing that rent has been adverted to prior to the date of that conveyance. It is not shown that the defendant was brought before the Incumbered Estates Court; nor, assuming that the Incumbered Estates Commissioners had jurisdiction to make this reduction permanent, that they did in fact by any order reduce it permanently.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

The next document is the conveyance from the Incumbered Estates Commissioners to Rochfort, the plaintiff: it bears date the 19th of August 1850; and by it two of the Incumbered Estates Commissioners conveyed to the plaintiff "all that and those part "of the lands of Curraghtown, in the tenancy of Matthew Ennis, "and containing 126 acres and 31 perches, English statute measure, situate in the barony of Upper Deece and county of "Meath, to hold the same unto the said Francis Rochfort, his "heirs and assigns, for ever, subject to a certain indenture of "lease thereof, made to William James Darcy, and dated the 10th "day of April 1841, for a life (since deceased) or twenty-one years "to be computed from the 25th day of March 1842, at the yearly "rent of £142. 6s. 9½d., payable half-yearly, on every 25th day "of March and 29th day of September in each year." That is the substance of the conveyance, so far as it is necessary to advert to it; and the question now arises, whether the defendant is now liable to pay to the plaintiff the full rent which the lessee in the lease of the 10th of April 1841 covenanted to pay, and which he is bound to pay, unless something has occurred to discharge him from that liability to pay that full rent? The defendant says—"I admit "that I hold as tenant under the lease of the 10th of April 1841; I "admit that the interest of the lessee in that lease has become vested "in me; but I say that something which discharges me from the "liability to pay the full rent has intervened." The plaintiff makes a very simple case: he says—"my action is founded on the lease "of the 10th of April 1841, which is not controverted. It is further admitted that I am in the position of the assignee of the "reversion expectant on that lease; that both the fee and the "immediate reversion have become vested in me. It is further "admitted that the defendant is assignee of the interest of the lessee

H. T. 1861.  
*Queen's Bench*

ROCHFORD  
 v.

ENNIS.

"in the lease of the 10th of April 1841; that he is in no other position, and has no other right. There is no question as to the identity of the lands; but there is in the conveyance an erroneous recital of one term of the lease in question: but that erroneous recital is at once displaced by the production of the lease of the 10th of April 1841; and I call upon the Court to reject that erroneous recital." Now the recital is this:—"To hold the same unto the said Francis Rochfort, his heirs and assigns, for ever, subject to a certain indenture of lease thereof made to William James Darcy, and dated the 10th day of April 1841 for a life (since deceased) or twenty-one years to be computed from the 25th day of March 1842." So far the description of the lease is accurate in every respect. It *is* a lease to W. J. Darcy; it *is* dated the 10th of April 1841; it *is* a lease for a life or twenty-one years; and the term *is* to commence on the 25th of March 1842; and the gale days are also correctly stated. But then intervenes the passage which is said to be incorrect—"at the yearly rent of £142. 6s. 9½d." The defendant contends that the recital is true, and makes a case which, if true in fact, would make that description correct in all its parts.

I have the misfortune to differ from the opinions of at least two of the other Members of the Court; and therefore I express my opinion with the greatest diffidence; but so expressing my opinion, it seems to me that, if this had been the case of a private conveyance and purchase—if, instead of the Commissioners, it had been Bateman conveying his immediate reversion, and that he had conveyed it in similar terms, misdescribing the lease in the particular to which I have adverted,—I apprehend that, as between these parties, there would have been no question; and that the tenant, who admitted that he held under the lease of the 10th of April 1841, and that he had no other title, and who failed to show that Rochfort his landlord had abated the rent, could not rely upon the misrecital, and say that it gave him a title to resist the performance of his covenants. It will remain however for us to see whether the circumstance that the conveyance is made by the Commissioners makes any difference in the case.

The question rests on the passage in the conveyance, "*at the*

yearly rent of £142. 6s. 9½d." The case was argued, not only with great ability, but the Court has derived every possible assistance from the learned Counsel. As I understood the argument of Mr. *Walsh*, the defendant contends, first, that the Commissioners had authority and jurisdiction to ascertain and settle the terms of the tenancy subject to which they sold the lands in fee; and that in doing so they might make permanent the temporary abatement of the rent. For the purpose of establishing these propositions, we were referred to the 12 & 13 *Vic.*, c. 77, ss. 15 and 23. The defendant further contended that the Commissioners did in fact, in some way or other, exercise that authority; and urged that, upon its true construction, the conveyance itself proves that they had done so. He also relied upon the 12 & 13 *Vic.*, c. 77, ss. 27 and 45, to show the potent effect of that conveyance, and its binding obligation on the whole world. Now, the 15th section is the one which gives the Commissioners "the jurisdiction of a "Court of Equity for the investigation of title, and for ascertaining and allowing incumbrances and charges, and the amounts "due thereon, and settling the priority of such incumbrances and "charges respectively, and the rights of the owners and others; "and generally for ascertaining and allowing the rights of all "persons in any land or lease in respect of which application "may be made under this Act." The 23rd section enacts, "that "where a sale shall be made under this Act, the Commissioners "shall, where and so far as they may deem necessary for the purposes of such sale, *ascertain* the tenancies of the occupying "tenants, and of any lessees or under-lessees whose tenancies, "leases or under-leases affect the land or lease, or part thereof, "to be sold, and may give such notices, and make, or cause to "be made, such inquiries as they shall think necessary for ascertaining and securing the rights of such tenants, lessees or under-lessees." These were the two sections referred to by the Counsel for the defendant, to support his position that the Commissioners had authority to ascertain and settle tenancies, and to make permanent abatements in the rent.

The plaintiff, on the other hand, contended that, although it was

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

H. T. 1861.  
*Queen's Bench*

ROCHFORD

*v.*

ENNIS.

the duty of the Commissioners to ascertain the terms of the existing tenancies, and to define them so as to settle the rights of the parties, they had no authority to alter those terms; and that, in reference to lessees, they were merely to ascertain the instrument under which the lessees held, and to sell the lands subject to it. He further contended that, even supposing that the Commissioners had this jurisdiction, and that they might do these acts, the defendant had wholly failed to show that the Commissioners have in fact exercised this jurisdiction. For the purposes of the conclusion at which I have arrived, it is not necessary to offer any opinion whether the Commissioners had authority, of their own motion or otherwise, to alter the terms of existing tenancies. It is one thing to say that they have a right to ascertain the title to the land or lease to be sold, and to give the purchaser of the land, or of the lessee's interest, a Parliamentary title against all the world; but it is another question whether, in ascertaining tenancies, they have authority to alter the existing terms of a tenancy, and then to give the tenant a Parliamentary title against all the world. On that question, I entertain grave doubt; but it is unnecessary for me now to express any opinion on it; and, for the purposes of my present judgment, I assume, in the fullest and most ample terms, that the Commissioners had the jurisdiction ascribed to them by the defendant; and that, either upon the application of the parties, or at their own discretion, they might have altered the terms of the lease of the 10th of April 1841, by reducing permanently the rent therein reserved to the lesser rent of £142. 6s. 9½d. But assuming that the Commissioners had such authority, yet, in my opinion, the defendant has failed to show, in point of fact, that this permanent alteration in the terms of the tenancy ever took place. In order to establish his case, the defendant should have been able to show us that, by some order of the Commissioners prior to the conveyance itself, this abatement of the rent had been made permanent. It was upon that account that I referred to the circumstance that the defendant is not brought into connection with the proceedings before the Commissioners; and though the special case has been amended, and though the parties have had an opportunity to do so, the defendant has failed to show

us that, anterior to the execution of the conveyance itself, there was any judicial act or order by the Commissioners affecting the terms of this lease, and the amount of the rent. If the Commissioners had this jurisdiction, it was to be exercised, not capriciously, or according to whim, but by an order, against which the parties would have had the right and the opportunity of appealing. I assume that they had the jurisdiction to make such an order; but the defendant has not satisfied me that, irrespectively of the recital in the conveyance, there is any evidence of such an order having been made. I have applied to this case a test which I always, when at the Bar, found to be convenient:—how is the defendant to plead the defence which he has set up? And supposing that this had been an action of covenant by the assignee of the reversion against the assignee of the lessee, and that the defendant admitted the lease, and that he was bound by the covenants in it, how was he to plead? He should have specially pleaded an order or judicial act of the Commissioners reducing the rent; but he now only points at the recital in the conveyance, which is a ministerial act, and calls upon the Court to infer that, by some order, the Commissioners did in fact reduce the rent permanently. I should have thought that the defendant would have pleaded—"I admit that I am bound by this lease and "by the covenants contained in it; but the Commissioners had "authority to reduce the rent permanently: they did so by an "order of such a date; and although they sold the fee subject "to such a tenancy, I am, by reason of that order, discharged "from the liability to pay the higher rent." The defendant, however, does not plead in that way; but points to what the plaintiff calls an erroneous recital in the conveyance, but which the defendant says is a true recital, and asks the Court, upon the authority of *Errington v. Rorke* (a), to infer everything in his favor. But *Errington v. Rorke* is a totally different case; in it the Commissioners had, beyond question, conveyed the lands to the purchaser: and what the House of Lords said was, that where the Incumbered Estates Commissioners have jurisdiction, and have *done* a thing within that jurisdiction, then, upon the cogent terms of the 12 & 13

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

(a) 9 Ir. Com. Law Rep. 357.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

*Vic.*, c. 77, sec. 49, we are bound to presume everything in favor of their act. But the defendant rests his defence simply upon this conveyance, to which he is not a party, and calls upon us to infer that the Commissioners exercised, in some way or other, their jurisdiction in his favor. I think that it would be too strong so to construe the recitals in the conveyance; and, on the contrary, I adopt the construction so very clearly brought before us by Mr. *Flanagan*. I think that it is the true construction; and that for the purposes of this action we ought to reject that portion of the description of the lease, to look at the conveyance and the lease together; and looking at them together, irrespectively of the other documents, I think that this is more than an erroneous description, and that we ought to reject it, and give judgment for the plaintiff.

In forming the opinion I have just expressed, I have excluded all extraneous matter; and have put the case in the strongest way in favor of the defendant. If I have been wrong in assuming that the Commissioners had jurisdiction to alter the terms of the tenancy, the case would be much stronger in favor of the plaintiff; and although I have stated the facts at large, I have confined myself, in the opinion which I have expressed, to the conveyance, and to the lease. Let us now read the conveyance by the light of the surrounding circumstances; by which I mean the tenant's lease; the admitted fact that the defendant is in possession as assignee of the lease, and holds under the order of the Court of Chancery; the rental, and the epitome. If we are at liberty to refer to these documents, the reference, so far from strengthening the defendant's case, makes the plaintiff's case free from all doubt; and shows that what has been done is substantially the same as in *Booth v. Daly*. In *Booth v. Daly*, the conveyance referred to a schedule which was affixed to it; and which thus described the lease, subject to which the lands had been sold:—"Lease dated the 1st of November 1810, from W. W. to P. D., for the life of C. B. The rent reserved by lease is £23. 19s., late Irish currency, abated to the sum stated in the rental, which includes tithe rentcharge." There was nothing in that case to show how the abatement had taken

place. Upon the documents, it would appear to me that *Booth v. Daly* is more difficult to deal with than the present case; and was stronger for the defendant. For, if we are to read the conveyance in the present case by the light of documents, we find how this reduction was made; and we find that the sale was a sale subject to the lease, but describing the rent as having been reduced by an order of the Court of Chancery. Now in *Booth v. Daly*, Cramp-ton, J., in delivering his judgment as to whether the conveyance of the Commissioners can have any greater effect than one made between private parties, said:—"Further, this reduced abatement was made by order of the Court of Chancery, and it has never been held that such would bind the landlord when he resumed possession. How could this statement create a right in the Commissioners to sell subject to the abated rent? The Act of Parliament is against that view, for it says, the Commissioners shall sell subject to the tenancies and leases. . . . . The Commissioners would have been bound to put in the abated rent, if the tenant had produced a new lease, or anything under seal, to show that abatement; but without that it could not be done. The schedule does not state that the abatement was done by any act which would affect the reversion; there is nothing like a statement of a perpetual reduction; and the original contract being by deed, could only be dissolved *eo ligamine quo ligatur*. By law it was only a temporary reduction." In that same case, Lefroy, C. J., says, in his judgment:—"This a special case, raising the question that originated in an action brought by a landlord against his tenant; suing him for a certain rent reserved by a lease executed under the hand and seal of the tenant; and the answer of the tenant is not a release of the rent, nor a covenant or agreement to abate the rent, nor any legal principle that would be an answer in a Court of Law to the action brought on this lease." Every word of that passage appears to me to be applicable to the present case. Again—"It is not disputed," said the Lord Chief Justice, "that the plaintiff was assignee of the reversion, incident to which the rent was attached, for the conveyance passed the reversion subject to the lease; and so the

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.



H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

"assignee of that reversion became entitled to the rent reserved by that lease. It is true, and I will take it in the strongest way, that this abatement was made by a note in writing under the hand of the former owner of the lands, that they were held at an abated rent; but there is no authority to show that such a note in writing could be an answer to an action of debt or covenant, or an ejectment brought on that lease." And again, the Lord Chief Justice said:—"If they intended to sell, subject only to the abated rent, they might have so stated; but I am at a loss to find any jurisdiction giving them power to take upon themselves to decide a question between landlord and tenant, of a dubious character; they have nothing to do but state the true condition of the property, and apprise the purchaser fairly upon what terms he purchases, that he may know there is a lease giving him a legal title to a rent, but that there may be an equitable title to reduce that rent, that an abated rent had been received; and they give the purchaser notice of that abatement, reserving to the tenant the right to that abatement if he be entitled to it. A mere temporary abatement will not deprive the owner of the estate, or his creditors who may be selling it, of the right to the larger rent." Now so far as I have read that judgment, I adopt every word of it. It is applicable to the case now before us; and if I am right in reading this conveyance, with the aid of the other documents, the case is infinitely stronger for the plaintiff than *Booth v. Daly*; for there is a reference to the order of the Court of Chancery, which made the abatement, and shows it to be temporary in its end and character.

My judgment then is, assuming the Commissioners had the fullest, most ample, and extraordinary authority that has been claimed for them, yet that the defendant has failed to show that they have in fact exercised that authority in his favor. I am of opinion, therefore, that the plaintiff is entitled to our judgment for the greater rent.

HAYES, J.

My Brother FITZGERALD has gone so fully into the facts of this

case, the reasons upon which his judgment is founded, and the authorities bearing upon the case, that I should hold myself inexcusable if I were to go into the matter at any length. Little more remains for me to do than to express my concurrence in the conclusion at which he has arrived. I do not think it necessary to question—indeed for the purposes of this case, I am willing to concede to the Incumbered Estates Court, all the transcendent powers which have been demanded for it—that the Commissioners might have conveyed these lands subject to any lease or to any tenure which they thought right to specify on the face of their conveyance; and that it was possible for them to have perpetrated injustice to an indefinite extent: yet, it is not too much for us to inquire whether they have, in fact, done all this? Whatever be the effect of their conveyances, they must be construed precisely as those of any other persons. And now let us see what, according to the true construction of the deed, has been done here. The first material statement is, that these lands are to be held “subject to a certain *indenture* of lease.” It is not a tenancy made up partly of a lease and partly of an agreement, but it is “subject to a certain *indenture* of lease;” and then the conveyance goes on to specify this lease—to specify it, not in the usual way in which leases are specified, by date and parties, but by giving several ear-marks—namely, the person to whom the lease was granted (W. J. Darcy); the date of the lease (the 10th of April 1841); the tenure of the lease (for a life, since deceased, or twenty-one years); the gale days (the 25th of March and the 29th of September); and the rent (at the yearly rent of £142. 6s. 9½d., payable half-yearly). Now, the conveyance has erred in only one (the rent) of all these specified particulars; and if this were an ordinary deed, I think, upon its true construction, we should hold that this was an erroneous setting forth of the rent intended to be set forth; that the true intent and meaning of the Commissioners was to set forth the rent as reserved in the lease of the 10th of April 1841; and that enough remained to enable us to fix and specify the lease. In arriving at this conclusion, I do not think I at all encroach on, but rather am governed by, the decision in *Errington v. Rorke*. There the conveyance of the

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

H. T. 1861. Commissioners was found to be not accurate in all its parts. But  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS. the House of Lords, dealing with and construing that conveyance as they would deal with any other conveyance, held that, though inaccurate, it was sufficient to pass the lands. So, here, though the description as to the rent is inaccurate, yet the lease is sufficiently specified in the conveyance to enable us to correct the statement as to the rent.

O'BRIEN, J.

In this case, I have arrived at a conclusion different from that of my two learned Brethren who have preceded me, and am of opinion that the first three questions should be answered in favor of the defendant, and that judgment should be given for him accordingly. With respect to the fourth question, I think we should decline to answer it, and that it should be struck out. An answer to it is, in fact, not necessary for the purposes of the case, and it is objectionable in point of form, as it requires us to pronounce upon the future rights and liabilities of the parties; and I think we should exceed our powers by answering it. With respect to the substantial questions before us, it must be admitted, by any one who has heard the able arguments of Counsel and the judgments of my learned Brethren, that the case is one of difficulty; but, having given it every attention in my power, I have come to a conclusion in defendant's favor, upon grounds with which I should feel perfectly satisfied were it not that I differ therein from two Members of the Court. In discussing the question of the construction and effect of the Incumbered Estates Court conveyance of 1850, much of the argument has been directed to the extent of the powers given to the Commissioners, by their statutes, to deal with tenancies; how far they could, without exceeding those powers, alter the terms of the contract between landlord and tenant; and put the tenant, by their conveyance, in a better condition than he had been before. Plaintiff's Counsel contend that, in the case now before us, the Commissioners had no power to reduce the rent in the lease, or to make permanent, by their conveyance, an abatement which was theretofore only temporary; and they also contend that, even sup-

posing the Commissioners had such a power, they have not, in fact, exercised it; and that the conveyance of 1850, according to its true construction, had not the effect of reducing the rent in the lease, or of entitling the defendant to hold under the lease at the abated rent. Plaintiff's Counsel have argued this question of the Commissioners' powers—first, for the purpose of showing that plaintiff would not be bound by the abatement, even supposing the conveyance to bear the construction contended for by defendant; and, secondly, as a ground why we should not put such a construction upon it, inasmuch as plaintiff contends that, by doing so, we would decide that the Commissioners, in executing such a conveyance, had exceeded their statutable powers. It appears to me that, in this case (as was said by Crampton, J., in *Booth v. Daly* (a), the question is, "What have the Commissioners really done, and what is the effect of their conveyance?" and that we should uphold their act, and give effect to what they have done, without questioning the existence of their power to do so, or the propriety of their exercise of that power. The judgment of the House of Lords in *Rorke v. Errington* (b), adopting the opinion of the Judges, as stated by Mr. Justice Willes, shows the extent to which the Court should go in upholding the conveyance. In page 369, Willes, J., says that even the consent of the lessees in that case should (if necessary) be absolutely presumed in favor of the conveyance. That opinion is, I think, fully warranted by the sections of the Act to which he refers, particularly the 49th section, which expressly provides that "every conveyance and assignment executed, and every order made "by the Commissioners, shall, for all purposes, be *conclusive* "evidence that every application, *consent*, and *act* whatsoever, "which ought to have been made, given, and done previously to "the execution of such conveyance, had been made, given, and "done, by the person authorised to make, give, and do the same." It is difficult to conceive words more express, or more clearly warranting the decision of the House of Lords. I need not refer to the other sections on which Justice Willes relied. Plaintiff's Counsel however contend that, so far as regards tenancies, the effect of this

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

(a) 6 Ir. Com. Law Rep. 466 & 471.

(b) 9 Ir. Com. Law Rep. 357.

H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

49th section is modified materially by the preceding 23rd and 27th sections of the Act ; that, under the 23rd section, the powers of the Commissioners is confined to the ascertainment of the rights of the tenants, and to the securing of those rights, having regard also to the rights of the creditors and owners ; but that the Commissioners are not entitled to abate the tenants' rents, or to confer upon them any rights which they did not previously possess : and that, under the 27th section, the effect of the conveyance was to discharge the purchaser from all leases, agreements, &c., not mentioned in the conveyance, or schedule thereto, but was not to make the purchaser subject to leases or tenancies not otherwise subsisting. And plaintiff's Counsel further contend that, in the present case, even supposing the Commissioners had power to entertain a claim for the abatement, and to decide in its favor, yet that no such claim or decision was, in fact, ever made. It appears to me, with respect to the 23rd section, that, even if the question depends upon the extent of the powers thereby given to the Commissioners, it would be difficult to maintain the limited construction put upon it by plaintiff's Counsel. That section empowers the Commissioners to ascertain the tenancies of occupying tenants, lessees, or under-leasees, whose tenancies affect the lands ; and it then expressly directs that the sale shall be made subject to such tenancies as it should appear to the Commissioners the sale should be made subject to. Supposing then that a tenant, holding under a lease, should (upon the ground of some agreement subsequent to the lease) claim a right to have the terms of the lease modified, either by abatement of rent or otherwise, and to have the lands sold subject to such lease, so modified, can it be held that the Commissioners, who have authority to deal with the entire estate in the lands, who are empowered by the 23rd section to sell them, subject to, or discharged from, any particular lease, without reference to the strict legal rights of the parties, and even to sell them subject to an under-lease, though discharged of the lease out of which such under-lease was derived, yet that the Commissioners would not be authorised to entertain and decide upon that claim ? If, under the 23rd section, they have the power of dealing with the claim, I do

not see how the propriety of their decision can be disputed here. In my opinion however the question in this case does not depend upon the extent of the powers given by the 23rd section. The 24th section provides that every conveyance by the Commissioners shall "express or refer to the tenancies, leases, and under-leases (if any) . . . subject to which the sale is made;" and the 27th section enacts that every conveyance of the Commissioners "shall be effectual to pass the fee-simple and inheritance of the land thereby expressed to be conveyed, *subject to such tenancies, leases, and under-leases as shall be expressed or referred to therein, as aforesaid*; but (save as therein provided) discharged "from all other estates, titles, &c." I see no ground for holding (as contended for by plaintiff's Counsel) that the effect of this section should be limited to the protection of the purchaser: and, reading it in connection with the 49th section, the clear result of both appears to be, that if, in this case, the conveyance, according to its true construction, purport to convey the lands to the purchaser subject to a tenancy at the lesser rent, we should give effect to that construction, and hold the purchaser bound by the abatement, and entitled only to recover such lesser rent, without considering whether the Commissioners had or had not power under the statute to entertain the question of an abatement, or whether their decision on that question was in accordance with, or contrary to, the clear rights of the parties; and that we should do so even without inquiring whether, in the proceedings before the Commissioners previous to the conveyance, such abatement had in fact been claimed by the tenants, or acceded to by them. Assuming, for the present, that the construction of the conveyance contended for by defendant is correct, it follows, in my opinion, from the 49th section, that if, on the one hand, the Commissioners had, under the 23rd section, the power of abating the rent during the residue of the tenancies, then we should consider that conveyance as conclusive evidence that all previous applications and proceedings requisite for such purpose had been previously made and taken; but if, on the other hand, according to plaintiff's argument, the Commissioners had no such power without the consent of the parties, that then, in the words of

H. T. 1861.

*Queen's Bench*

ROCHFORD

v.

ENNIS.

H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

Willes, J., in *Rorke v. Errington*, we should presume, in favor of the conveyance, that such consent had been given. Independent however of these questions, as to the construction of the statute and the Commissioners' powers under it, I do not see how, in this particular case, the purchaser who claims under the conveyance from the Commissioners, and has no rights as against the tenant except what he derives under it, can deny that he is bound by its provisions, or can assert against the tenant a right inconsistent with those provisions, upon the ground that the Commissioners had no power to make them. Even supposing that, in some other case (notwithstanding the decisions to the contrary), a stranger to the conveyance and to the proceedings, who had previously existing rights, of which he would be deprived by the conveyance, might question the power of the Commissioners to defeat those rights; still, in this case, the plaintiff, whose only title is under that very conveyance, would, in my opinion, be precluded from claiming rights hereunder inconsistent with those rights which are thereby declared to belong to the tenant, and to which that conveyance is expressly made subject.

With respect to the facts of this case, my Brother FITZGERALD has stated them so fully in his judgment that it is unnecessary for me to refer to them in detail. Plaintiff relies on them as showing that, previous to the conveyance, there was no order, consent or arrangement that the abatement should be continued during the residue of the term in the lease. Now, even supposing plaintiff to be correct in this view of the facts, I think, upon the grounds I have already stated, with reference to the construction and effect of the 27th and 49th sections, it would not establish plaintiff's case. I may remark however that the state of facts is very peculiar; and if it were necessary for the decision of this case, I think it appears from them that some arrangement, not actually stated in the recorded proceedings of the Court, must have been entered into between the parties and the defendant before the lands could have been sold subject to this lease, whether at the original or at the abated rent. The effect of the absolute order of the 17th of April 1850, directing that the lands should be sold discharged of Bate-

man's lease of 1832, was to get rid of the under-lease of 1841 then vested in defendant (which had been carved out of the lease of 1832), and to provide that the lands should be sold subject only to a yearly tenancy in the representatives of Bateman; and that the possession by defendant should be only as their under-tenant from year to year. It appears also that, on the 13th of March 1850 (previous to said order), defendant, as the tenant in possession, had been served with a notice, pursuant to the 13th General Rule of the Court, describing the lands as held by Bateman's representatives as yearly tenants, at the rent of £105. 16s. 0d. (being the rent reserved by the lease of 1832); and no claim or objection was made by defendant in answer to said notice. If the sale and conveyance had been in accordance with that notice, then Bateman's representatives would have been yearly tenants to the purchaser at said rent of £105; and defendant, who was in possession, would have been their yearly under-tenant; but the relation of landlord and tenant would not have subsisted between him and the purchaser. The parties did not proceed (as might have been done under the 36th section) to sell, as well the fee-simple subject to the lease of 1832, as also the interest in that lease, leaving undisturbed the under-lease of 1841; but they adopted the course of selling the lands discharged of the lease of 1832; which course would have the effect, I have already stated, of determining both that lease and the under-lease. We find however that subsequently the rental under which the lands were sold describes them as subject to a tenancy in defendant under said sub-lease of 1841; and the epitome used at the sale is to the same effect. No order or document is referred to in the case before us, which would authorise or account for this material departure from the terms of the sale, and the rights of the parties stated in the notice of March 1850, and subsequent order of April; but it is manifest that there must have been some intervening agreement or arrangement between the parties to warrant that variation. Is it then so clear, as plaintiff contends, that it was not part of the terms of such an arrangement that the tenancy agreed thereby to be created between defendant and the purchaser, for the residue of the lease,

H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.



H. T. 1861.  
*Queen's Bench*

ROCHFORD

v.

ENNIS,

should be a tenancy at the abated rent? Though the rental states the original as well as the abated rent, and that the abatement had been made by the Court of Chancery, yet the epitome used at the sale stated the lands as held by defendant under a lease, and producing the lesser rent, without referring to the fact of an abatement, or of a greater rent having been originally reserved by the lease. The order of the Court of Chancery directing the abatement, and made about six or seven months previous to the sale, would show the depreciation in value of the lands from the date of the sub-lease of 1841. The defendant may have been therefore unwilling to assume the responsibility of binding himself to the payment of the original rent; and the parties, on the other hand, may have considered the abated rent as the fair value of the lands, and thought it advisable to sell the lands subject to a tenancy for the residue of the lease, at even the abated rent. I make these observations on the facts, as so much was urged during the argument upon the probabilities of the case; but I express no opinion on the question whether those facts establish that there was an actual arrangement or consent by the parties to continue the abatement during the tenancy; and I rest my decision in this case, not upon the supposition that any such arrangement or consent was in fact entered into, but (as I have already stated) upon the effect which, under the 27th and 49th sections, should in my opinion be given to the deed of conveyance, according to its true construction.

Plaintiff's Counsel have further argued that this case should be considered as analogous to that where the owner of an estate, having executed a lease, afterwards conveys the estate to a purchaser by a deed, executed out of Court, the schedule to which purports to set out the particulars of the lease, but where the rent reserved by the lease is by mistake erroneously stated in the schedule; and Counsel contend that as, in such a case, the erroneous insertion of a lesser rent in the schedule would be no answer to an action brought by the purchaser, as assignee of the reversion, against the tenant for the rent actually reserved by the lease, a similar rule should prevail in the present case; and that the defence

relied on here could not in fact be sustained or pleaded at law. In my opinion however there is an important difference between the two cases. If the lands were granted to a purchaser, by the owner, by deed executed out of Court, then, although the lease was not referred to either in the body of the conveyance, or in a schedule thereto, the purchaser, as assignee of the reversion, would acquire, by the mere conveyance of the land, the right to recover the rent actually reserved by the lease, as the lessor himself might have done. And it may well be argued that where any reference to the lease, either in the conveyance or schedule, is wholly unnecessary, the rights of the purchaser should not be prejudiced by the insertion of an erroneous rent in the description of the lease. But the case of a conveyance by the Incumbered Estates Court is very different. The statute requires that the conveyance should specify the tenancies subject to which the sale is made: if they are not mentioned, the relation of landlord and tenant is not established between the purchaser and the former tenants; and under the 27th section the effect of the conveyance is (as I have already stated) to discharge the purchaser and the lands from all other tenancies not mentioned either in the conveyance or schedule. The terms of the tenancies as to rent, &c., cannot therefore be different from those to be collected from the conveyance, which I admit may be done, not only by express statements thereof in the conveyance, but also by reference to other documents therein mentioned, if such be according to the true construction of the conveyance. In the present case, I see no reason why, in answer to an action at law brought for the greater rent, the defendant may not rely on the defence put forward here, namely, that the purchaser who claims to be defendant's landlord only under the conveyance, has no further rights than what the conveyance gives him, and cannot recover the greater rent if the tenancy established by the conveyance was at the lesser rent. I may remark that a conveyance out of Court, by Dopping to the plaintiff, would have given the plaintiff no right to recover from defendant the rent in the lease of 1841, or to sue defendant on that lease; inasmuch as the relation of landlord and tenant never subsisted between Dopping and defendant, and there

H. T. 1861.  
*Queen's Bench*  
ROCHFORD  
v.  
ENNIS.

M. T. 1860.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

was no privity between them in respect of that lease. It is true that any technical difficulty in plaintiff's way from this circumstance is removed by the 5th section of the Incumbered Estates Continuance Act 1853, which renders the conveyance conclusive evidence that the purchaser is entitled to the reversion expectant on any lease or tenancy subject to which the conveyance is made; but it remains to be considered what are the terms of such tenancy as expressed in the conveyance, and what, according to the true construction of that instrument, the Commissioners have thereby purported to do in respect of such tenancy. This is the question upon which, in my opinion, our decision should depend. Plaintiff contends that, according to the true construction of the conveyance, the tenancy, subject to which it was made, was a tenancy at the rent actually reserved by the lease of 1841, and on the other terms of such lease; that the insertion in the conveyance of the lesser rent was not for the purpose of defining the rent at which the tenant should thereafter hold, but was to be regarded as at most an erroneous recital or description of the contents of the lease; and that therefore such error might be corrected by reference to the lease itself, which was incorporated in the conveyance, so that the purchaser should not be prejudiced thereby. In support of this proposition, plaintiff's Counsel rely upon *Booth v. Daly* (a); but the conveyance in that case differed materially from the conveyance now before us; and the decision as to its construction does not rule the present. In *Booth v. Daly*, the lands were granted by the conveyance "subject to the leases and tenancies referred to in the schedule thereunto annexed;" and, although in the schedule the sum mentioned in the column of "*annual rent*" was the abated rent, yet in the column of "*tenure*," the lease itself, and the actual rent thereby reserved, were stated, together with the fact of its having been abated. In that case therefore the facts were stated, which showed the position in which the purchaser and tenant would stand, and what would be the purchaser's rights in respect of the lease subject to which the conveyance was made; and there was nothing in the conveyance or schedule to prejudice his right, as assignee of the reversion,

(a) 6 Ir. Com. Law Rep. 460.

to enforce the rent originally reserved by the lease. It was not affected by the mere statement of the rent having been abated, inasmuch as it did not appear to have been made in such a way as would entitle the tenant to consider it permanent. In the present case, however, the conveyance grants the lands "subject to a certain indenture of lease thereof, made to W. J. Darcy, and dated the 10th of April 1841, for a life (since deceased), or twenty-one years to be computed from the 25th of March 1842, at the yearly rent of £142. 6s. 9½d., payable half-yearly on every 25th of March and 29th September in every year." Upon the conveyance itself therefore (and without referring to the lease), there would be no doubt or uncertainty whatever as to what the terms of the tenancy were to be: the rent was specified, nothing was said about its having been an abated rent; nothing to show that a greater rent had been originally reserved by the lease.

Plaintiff's Counsel, however, contend that we should construe this part of the conveyance as if the word "made" governed the entire of the rest of the passage; and as purporting to state that the lease was made at the yearly rent of £142. 6s. 9½d.; and that, accordingly, such statement was an erroneous recital or description of the contents of the lease, which could be corrected by reference to the lease itself. Defendant's Counsel, on the other hand, contend that we should construe this passage, not as stating the rent of £142. 6s. 9½d. to have been the rent reserved by the lease; but as stating it to be the rent thereafter to be payable during the continuance of the lease; that we should not unnecessarily suppose error in the the conveyance: and that we should construe it as conveying the lands subject to a tenancy, which was to be at the rent actually specified in the conveyance, but which in other respects was to be according to the terms of the lease therein set forth. Upon this part of the case I concur in the argument of defendant's Counsel, namely, that in construing a deed we should, if possible, adopt such a construction as would give effect to every word in it. And that if the instrument appear complete upon the face of it, we should not, except upon clear grounds, suppose that words in it were inserted by error or mistake. In the case of *Morrell v.*

H. T. 1861.  
*Queen's Bench*  
**ROCHFORD**  
*v.*  
**ENNIS.**

H. T. 1861.  
*Queen's Bench*  
 BOCHFORT  
 v.  
 ENNIS.

*Fisher (a)*, Baron Alderson, in giving the judgment of the Court of Exchequer, states as one of the rules for the construction of instruments:—"That if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood." Applying that principle to the present case, I ask is it clear upon this conveyance that the lesser rent was inserted therein as purporting to state the rent reserved in the lease itself; and that therefore we should "*intend error*" in the conveyance, by holding there was a misdescription of the terms of the lease? or is it clear that the lesser rent was not inserted as designating the rent to be thereafter payable, and as "*limiting the generality*" of the former words which refer to the lease, so as to provide that though the tenancy in other respects was to be according to the terms of the lease therein mentioned, it should, in respect of the rent, be at the rent actually specified in the conveyance? In my opinion, there are not, upon the conveyance itself, sufficient grounds for holding that the insertion of the lesser rent was to be accounted for as an erroneous description of the lease; and I think, therefore, we should adopt the construction contended for by defendant.

Plaintiff's Counsel have, however, further argued that, even supposing the conveyance, as it has been framed, should bear such construction, notwithstanding the reference to the lease, yet that it appears from the circumstances in the case, *dehors* the deed, that it was so framed in mistake, and contrary to the intentions of the parties. For the reasons I have already stated, I do not think the facts of the case sustain this allegation of mistake. But even if it were otherwise, I do not see how a Court of Law (independent of the difficulties arising from the peculiar nature of the Commissioners' conveyance and of their jurisdiction) could take cognizance of such a mistake or error, the existence of which is not to be inferred from what appears in the instrument itself, or in the document incorporated in it, without reference to various extrinsic circumstances.

(a) 4 Exch. Rep. 604.

I think we should construe the conveyance as it has been framed, and act upon that construction; and it is unnecessary to consider how far any other Court would be authorised to rectify such mistake.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

Upon these grounds I am of opinion, that defendant is entitled to our judgment.

LEFROY, C. J.

I agree with my Brother O'BRIEN in the opinion he has so well supported; but, with respect to my learned Brothers in whose judgments I do not concur, I would ask liberty to say, that I do not think they have given the consideration or effect to some of the facts before us to which they are entitled. The question is, whether the Commissioners had authority to do what the defendant insists was the effect of their conveyance—namely, to sell this estate subject to the lease of 10th April 1841, at the abated rent (in other words, subject to a tenancy founded on that lease, at the abated rent); or whether the effect of the conveyance was to pass the estate subject to that lease, at the original rent of £214. 8s. 4d.? The substance of the argument addressed to us has been, that the Commissioners had no authority to sell at the abated rent; but, even supposing they might, there was no adjudication by them to authorise a conveyance such as insisted upon by the defendant. It might be contended, upon the authority of the House of Lords, and the principles on which they acted in the case of *Errington v. Rorke*, that whatever appears clearly to have been intended to be done by the Commissioners by their conveyance, must be upheld; if, by the presumption or intendment of any act or acts which they had authority to do, or by any concurrence of the parties, effect could be given to that deed, such presumption or intendment must be made in support of their conveyance; but in the present case it is not necessary, in my opinion, to resort to presumption or intendment, as it appears to me that we have before us clear authority in point of law, and equally clear evidence in point of fact, to support the conveyance made by the Commissioners, according to the construction contended for on behalf of the defendant. First, then, let

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

us see what is the authority given by this Act to the Commissioners, as to sales subject to outstanding leases or tenancies. By the 23rd section, directions are given for the ascertainment of outstanding leases, under-leases, or tenancies, and that sale shall be made subject to the tenancies, leases, or under-leases ascertained as aforesaid, subject to which the owner or incumbrancer shall be owner or incumbrancer. Then come these further provisions: "And subject to such other of the tenancies, leases, and under-leases, ascertained as aforesaid, as shall appear to the Commissioners to have been granted *bona fide* by the owner or person in possession or in receipt of the rents and profits, and subject to which it shall appear to the Commissioners the sale should be made." Then comes this further provision: "And when the Commissioners shall think fit, the sale shall be made, subject to any leases, under-leases, or tenancies, according to any general description."

These latter provisions of this section appear to me particularly deserving of attention, as bearing on the case before us. They include, besides leases and under-leases, what are called "tenancies;" and not only such as were created by owners or incumbrancers, but also "such as shall appear to the Commissioners to have been granted *bona fide* by persons in possession and receipt of the rents and profits, and subject to which it shall appear to the Commissioners the sale should be made:" and, further, "when the Commissioners shall think fit, the sale shall be made subject to such leases, under-leases, or tenancies, according to any general description." Here, then, we have an authority given to the Commissioners to sell, subject to tenancies not comprised within the compass of a lease or under-lease, technically so called, but to be ascertained by a general description, comprising all the particulars which constitute the tenancy. By the 24th section, it is directed that "the sale shall be made at such time and place, and generally in such manner, as the Commissioners shall think fit; and the conveyance shall express or refer to the tenancies, leases, or under-leases (if any) subject to which the sale is made, and may be in the form contained in the schedule referred to by the Act, or to the like effect." This schedule I shall advert to more particularly

when I come to state the conveyance. I will now proceed to consider the facts of this case, which appear to me to show, on the part of the Commissioners, a course of proceeding in perfect conformity with the several provisions of the Act which I have just detailed.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

To present a correct view of the case, it is necessary to go back to the proceedings in the Court of Chancery, where the question now at issue, or at least the facts which give rise to it, may be said to have originated. A receiver had been appointed in that Court over the interest of Bateman, the lessee in the lease of 1st June 1832, at the instance of one of his creditors. Bateman had underlet to Darcy, by the lease of 1st June 1841, at the rent of £214. 8s. 4d. Darcy had assigned to the defendant Ennis, who was the tenant in possession at and before the appointment of the receiver, and so continued at the time of the sale. By an order of the Court of Chancery, on the 24th November 1849, the rent payable by Ennis was abated to the sum of £148. 2s. 9½d., which from thenceforth continued to be the rent he paid. I admit the Court of Chancery had no authority to make a permanent abatement, nor did it arrogate to itself authority to do so; but it had authority to make the order such as was made, having before it all the parties interested in the amount of the rent; these were Bateman the lessor and his creditor, then in receipt of the rents through the receiver, and Ennis the tenant in possession, and there is no question it was a *bona fide* transaction. All landed property had become at that time greatly depressed in value, and Ennis, as an assignee, might have effectually baffled any attempt to make him hold at a rent beyond the value, by assignment to a pauper. This abatement was therefore a reasonable measure, having the sanction of the Court, and being made with a due regard to the circumstances of the property and the rights of the parties interested. Here, then, we have, existing at the time of the sale, a *bona fide* tenancy, created by a creditor in receipt of the rents, subject to which the Commissioners (if they thought fit) might sell the estate, under the provisions of the 23rd section of the Act to which I have referred. Proceedings were taken to obtain a sale of the fee and inheritance of the lands held by Ennis, to pay a mortgage made by the inheritor, Bateman,



H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

the lessor of Ennis, and owner of the perpetuity lease of 1832, also took proceedings in the same Court, to have a sale of his interest under that lease; and accordingly an order was made by the Commissioners, in 1850, that the fee of the lands of Curraghtown (those now in question) should be sold discharged of Bateman's lease, "such sale to be without prejudice to the rights of the parties interested in the several estates respectively, in relation to the "purchase-money arising from the sale thereof:" a very important saving this, as to all the parties, as respected the interest of all in the proceeds of the sale. The result of these proceedings was to bring before the Incumbered Estates Court all the parties whose interests in the property enabled the Commissioners to deal with it in any manner authorised by the Act, with a view to the interest of them all. They had before them the owner in fee and his mortgagee, Bateman the lessee in the perpetuity lease of 1832, and his tenant Ennis, the assignee of Darcy, and then the tenant in the actual possession at the abated rent, under the circumstances already stated.

"I shall now proceed to state the several orders and acts of the Commissioners, in proceeding to effectuate this sale. We have, besides the preliminary orders for a sale, to which I have already adverted, the rental set out at large in the case, importing to describe "the property to be sold, and the tenancy subject to which it was to be sold." This rental, made under the direction and by the authority of the Commissioners, must be taken as the index of what they considered to be the fit and proper manner of bringing the property to sale for the interest of all parties. If the Commissioners meant to sell subject to the lease of 1841, as it stood at the original rent, they had only to say so. No further rental was requisite than to set out the particulars of that lease under the several columns or headings in the rental; but instead of that we find a rental differing from the lease of 1841, in some of its most essential particulars. The tenancy set forth is such as the Commissioners ascertained to be the tenancy existing at the time, and the differences between it and the lease of 1841, are set forth on the face of the rental. Thus in the Commissioners rental, under

the column or heading of "yearly rent," instead of £214. 8s. 6d., the rent in the lease of 1841, we find the abated rent of £148. 2s. 9½d., reduced by "rentcharge £5. 16s., leaving net annual rent £142. 6s. 9d.," showing these sums as the gross and net rent at which the sale was to take place. In like manner the statement of the tenant's tenure is made as it existed at the time of the sale, contrasted with what it was originally in the lease of 1841, and appears thus in the rental:—"Tenant's Tenure—Lease dated the 10th of April 1841, for a life (since deceased) "or twenty-one years from the 25th of March 1842, at the rent "of £214. 8s. 4d." The rental then adds—"This rent is reduced "by the Court of Chancery to the sum of £148. 2s. 9½d.; reduced "by rentcharge £5. 16s., leaving net annual rent £142. 6s. 9d.," the rent subject to which, as stated in the rental, the property was to be sold. We further find, as if to make assurance doubly sure as to the intention of the Commissioners, the contents of a paper called "Rental Epitome," set out on the face of the rental, as read at the time of the sale:—"Lot 6—The fee and "inheritance of that part of the lands of Curraghtown, containing "126a. 0r. 31p., statute measure, held by Matthew Ennis, under "a terminable lease, and producing the yearly rent of £142. 6s. 9½d." Is not this a tenancy set forth by a general description giving the several particulars which constituted the tenancy, amounting to this—"a tenancy under the lease of 1841, at the abated rent." Exactly conformable to this view, is the conveyance in pursuance of the provisions of the Act. By the 24th section—"The conveyance shall express or refer to the tenancies, "leases, or under-leases (if any), subject to which the sale is made; "and may be in the form contained in the schedule to the Act, or to "the like effect." By that schedule it is directed:—"That when the "sale is made subject thereto, the conveyance shall specify the "tenancies, leases, or under-leases, by reference to a schedule, or "otherwise." Here the tenancy is not set forth by reference to a schedule, but "*otherwise*," that is, in the body of the conveyance; and it is thus set forth:—"That part of the lands of Curraghtown, "in the tenancy of Matthew Ennis, containing 126a. 0r. 31p., "English statute measure, to hold the same to the said Francis

H. T. 1861.  
*Queen's Bench*

ROCHFORD  
v.  
ENNIS.

H. T. 1861. "Rochfort, his heirs and assigns, for ever, subject to a certain  
*Queen's Bench*  
**ROCHFORD** "indenture of lease thereof, made to James Darcy, dated the  
**v.** "10th of April 1841, for a life (since deceased) or twenty-one  
**ENNIS.** "years to be computed from the 26th of March 1842, at the  
 "yearly rent of £142. 6s. 9½d., payable half-yearly, on every  
 "25th of March and 29th of September in each year." Here  
 then is a tenancy in the body of the conveyance, agreeable to the  
 rental at which it was to be sold, and, by necessary inference, at  
 which it was to be bought, amounting to sale and conveyance  
 of the lands in the lease of 1841, for the residue of the term  
 therein, at the abated rent of £142. 6s. 9½d. A description not  
 vague or uncertain, but with precision and certainty as to every  
 particular necessary to ascertain the tenancy. With this state-  
 ment on the face of the conveyance, I cannot see how it is  
 possible for the plaintiff to sustain his demand consistently with  
 the provision of the original Act, or of the subsequent Act, 16 & 17  
*Vic.*, c. 64, s. 5, which enacts:—"When a conveyance is made  
 "subject to any lease, under-lease, or tenancy, such conveyance  
 "shall be deemed to afford conclusive proof that the estate or  
 "interest purported to be conveyed, is the reversion expectant  
 "upon such lease, under-lease, or tenancy." But it is said that  
 there was no judicial order to warrant the conveyance. I am not  
 aware of any ground that has been stated, to warrant this objection  
 of what is called a judicial act or order. But we have in the rental,  
 and the documents stated in it, and the conveyance, a series of, at  
 least, ministerial acts, to carry out a sale at the abated rent; and  
 if it required a judicial act to precede them, it must be presumed  
 in support of the conveyance, according to the authority to which  
 I have already adverted. Indeed I am at a loss to understand what  
 title or *locus standi* the plaintiff could have to recover any rent,  
 if the conveyance was void for want of authority. I am aware  
 of the ingenious fallacy by which it has been contended that the  
 conveyance must operate by implication to pass the reversion,  
 subject to the lease of 1841, at the original rent; and that the  
 specification of the abated rent must be rejected as a *falsa demon-*  
*stratio*. This I take to be a total misapplication of the rule  
 referred to, *quod falsa demonstratio non nocet*. The rule is not

designed to ascertain the subject-matter of the contract; but when that is ascertained, and a perfect description given of the subject-matter, the addition of any further particulars, inconsistent with the general description, shall be rejected as a *falsa demonstratio*. Here the subject-matter of the contract is a sale, subject not to the lease, but a tenancy constituted by the lease at the abated rent; accordingly, the statement of the abated rent is not a *falsa demonstratio* of any part of the contract, but perfectly consistent with it. There is another view which might be taken of this case in reference to the description in the conveyance. If it were to be considered in reference to the inconsistency between the rent set out in the conveyance and that on the face of the lease—if it be a latent ambiguity, it may be explained by evidence. The rental and evidence already referred to would explain it. If patent it would avoid the conveyance for uncertainty; and then what becomes of the plaintiff's right to claim anything under it? It would also be a fraud upon the arrangement made with the concurrence of all the parties, and sanctioned by the Commissioners, to allow the plaintiff to depart from the terms of that arrangement, under which alone he can claim any title. The case of *Booth v. Daly* is perfectly distinguishable from the present. There the sale was made by reference to the lease set out in the schedule, without any qualification, and consequently subject to it, as it stood in itself. Here the sale is made, subject not to the lease as it stood originally, but to a tenancy founded on the lease qualified as to the rent and other particulars, as set forth both in the rental and in the conveyance. In fact, as I have said before, subject to an existing tenancy, subject to which the Commissioners had a right to sell if they thought fit, and describe in the terms which they have done.

Upon these several grounds therefore, I am of opinion, judgment should be given for the defendant.

H. T. 1861.  
*Queen's Bench*  
 ROCHFORD  
 v.  
 ENNIS.

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NOTE.—The plaintiff being desirous to bring a writ of error to the Court of Exchequer Chamber, FITZGERALD, J., in conformity with the practice of the Court, withdrew his judgment *pro forma*, and judgment was given for the defendant. But, before the case could be carried into the Exchequer Chamber, the case was, as the Reporter has been informed, compromised on terms highly favorable to the plaintiff, namely, the defendant to surrender the lease immediately, and pay the plaintiff a large sum in lieu of arrears of rent and costs.

H. T. 1861.  
*Queen's Bench*

## COLEMAN

v.

## THE CORK AND YOUGHAL RAILWAY COMPANY.

Jan. 21.

The Common Law Procedure Amendment Act (Ireland) 1856 s. 11, gives the Court jurisdiction to remit, at any time, an award to the arbitrator, in order that he may correct a superficial error.

This jurisdiction cannot be ousted by inserting a prohibitory clause in the consent.

*Semble*—That the Court will, in every case, limit a time within which the amendment must be made.

THE plaintiff, as administratrix of her deceased husband, sued the Cork and Youghal Railway Company for compensation for the death of her husband, who, while in the employ of the Company, had been killed by an accident on the works of the railway.

The action was to have been tried in Dublin before the Lord Chief Justice, at the Sittings after Michaelmas Term 1860. Before the case was called on, the attorneys on both sides entered into a consent, which was afterwards made a rule of Court. It was (*inter alia*) consented, “that the several issues which contain the subject-matter of this action, *as to the matters of fact*, be referred to the award, order and final determination of Cornelius Keller, of the city of Cork, Alderman, and who is to assess damages for the plaintiff (if any), subject to the questions of law; and, *as to all matters of law*, in reference to said action, and the liability of the Company therein, to the award, order and final determination of Thomas Forsythe, of the city of Cork, one of her Majesty’s Counsel, *so as* the said arbitrators do make and publish their award in writing, and signed by them, . . . on or before the 20th day of December 1860, or on or before any other day to which the said arbitrators by any writing signed by them, from time to time, and *not later than* the 10th day of January 1861, enlarge the time for making their award.” The issues referred were then enumerated; and it was further consented that “the said Cornelius Keller do assess contingent damages on the demurrer” taken by the plaintiff to the fourth defence; and “that the costs of this action, and of preparing and executing said consent, and of making same a rule of Court, and the costs of the reference and award, including the fee or fees to be paid to said arbitrator, Thomas Forsythe, do abide the

"award of said arbitrators or arbitrator, as the case may be, and  
 "that all the witnesses on the reference shall be examined by the  
 "arbitrators on oath."

H. T. 1861.  
*Queen's Bench*  
 COLEMAN

v.  
 CORK AND  
 YOUGHAL  
 RAILWAY.

The award, which bore date the 19th of December 1860, recited the consent, the order of the Court, the examination of witnesses on oath by the arbitrators, and proceeded thus—"I, the said Cornelius Keller, do make the following award of and concerning the matters so referred to me alone as aforesaid. I award, &c.; and I assess the plaintiff's damages at the sum of £150; and do award that the defendants shall pay the sum of £150 to the plaintiff. And I further award that the said sum of £150 be divided in manner following . . . . . And I assess the damages contingent upon the demurrer . . . . . to the aforesaid sum of £150. And I declare that the sum of £150 sterling is the full amount of the sum recoverable by the plaintiff, as and for damages in this action. And inasmuch as it has been suggested to us that, as the costs, &c., now we, the said Cornelius Keller and Thomas Forsythe, do award, &c. In witness whereof we have hereunto respectively set our hands this 19th day of December 1860."

(Signed) "CORNELIUS KELLER.  
 "THOMAS FORSYTHE."

*Clarke* (with whom was *O'Riordan*) moved the Court "to remit to Thomas Forsythe, Esq., the matters of law referred to him by the consent or submission of the parties in this cause, so that he may correct his award, as to the defects on the face of it, by stating therein his award or determination, *as to said matters of law*, or for such other order as the Court may be pleased to make."

The first Act which gave the Court jurisdiction to enlarge the time for making an award was the 3 & 4 Vic., c. 105, s. 63, which enacted "That the Court, or any Judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award." The words of the analogous English Act (3 & 4 W. 4, c. 42, s. 39) are the same. There are some decisions to the effect that those words do not give the Court jurisdiction to enlarge the time, if the arbitrator has allowed it to expire without exercising his power to

H. T. 1861. *Queen's Bench* enlarge it: *Lambert v. Hutchinson* (a); *Andrews v. Eaton* (b).  
**COLEMAN** Those decisions have been overruled by *Parbery v. Newnham* (c);  
**v.** *Leslie v. Richardson* (d); and *In re Aithen* (e): so that, even under  
**CORK AND** the words of the 3 & 4 Vic., c. 105, s. 63, the Court has power to  
**YOUGHAL** enlarge the time for making the award, although the period limited  
**RAILWAY.** by the submission has elapsed. But, even if the jurisdiction of the  
 Court was doubtful under that statute, there can be no doubt but  
 that it exists under the much larger terms of the Common Law Pro-  
 cedure Amendment Act (Ireland) 1856, s. 11, which enacts "that  
 "the Court or a Judge shall have power *at any time*, and from time  
 "to time, to remit," &c. These are the very words used in the ana-  
 logous English Act (17 & 18 Vic., c. 125, s. 8). It has been held  
 indeed that that provision only enables the Court to remit the  
 award in cases in which the submission did not give the arbitrator  
 authority to enlarge the time: *Hodgkinson v. Fernie* (f): and that  
 it does not enable the Court to remit the award to be amended  
*because* the arbitrator has made a mistake in law. But the rule  
 is not invariable that the arbitrator's decision is final and conclu-  
 sive: *Hutchinson v. Shepperton* (g). If the award, though in part  
 conclusive, is bad in part, the Court will remit it for re-considera-  
 tion and amendment: *In re Aithen*. The jurisdiction of the Court  
 is not confined to cases of compulsory references, but extends also to  
 cases of references by submission: *Morris's Arbitration* (h). The  
 jurisdiction of the Court is therefore unquestionable. The case too  
 is a proper one for the exercise of that jurisdiction. The application  
 is made without delay; and the mistake is a mere inadvertency; for  
 it is manifest that there was either a withdrawal of the question of  
 law from the consideration of the arbitrator, or else he merely omit-  
 ted to state in the award the decision given by him on the demurrer.  
 In either case, the award ought to be remitted for amendment.

Serjeant *Sullivan* (and *Roper*), contra.

The prohibitory words in the consent are of the strongest charac-

(a) 2 M. & Gr. 858.

(b) 21 Law Jour., N. S., Exch., 110.

(c) 7 Mee. & W. 378.

(d) 6 C. B. 378.

(e) 3 Jur., N. S., 1296.

(f) 3 C. B., N. S., 189.

(g) 13 Q. B. 955.

(h) 6 El. & Bl. 383.

ter, and take from the arbitrators any jurisdiction to enlarge the time after a given day. No case can be cited to establish the proposition contended for by the plaintiff, in the case of a reference worded in such a manner. Even the large words of the Common Law Procedure Amendment Act (Ireland) 1856, s. 11, do not give the Court power to force the parties out of their solemn agreement. That section gives the Court only the same jurisdiction as, and no more than, it would have had if a clause enabling the arbitrators to enlarge the term from time to time had been inserted in the reference itself: *Hodgkinson v. Fernie* (a). Therefore, even if the submission had contained that clause, the Court could not have enlarged the time after the 18th of January 1861. The Court may send back the award only when the submission does not contain prohibitory words. Such was the case of *Morris's Arbitration*. The Court must act upon the contract into which the parties themselves entered, and by which they agreed to be bound. But, if the Court rules against the defendant on that point, still this motion, which calls upon the Court to remit the award, cannot be granted. The award cannot be remitted unless the Court first enlarges the time; and this motion does not ask for that relief: *Browne v. Collyer* (b). In this case, there has been no award at all on the matter of law which was referred, in distinct terms, to the decision of Mr. Forsythe. There were to be two distinct and several awards, one on the matters of fact, and the other on the question of law; and the arbitrators have made only one award. If Mr. Forsythe had made a determination on the question of law, and omitted to insert it, that fact should have been certified to the Court on affidavit. The Common Law Procedure Amendment Act (Ireland) 1856, s. 11, presupposes that the arbitrator has considered the matter, and made some mistake. Here, plainly, he has not considered the matter at all. Then, if this remission takes place, it will be a remission not to remedy a mistake, but to consider the whole matter anew. The Court has no jurisdiction to do that: *Fuller v. Fenwick* (c); *Hellaby v. Brown* (d); or else the arbitrator omitted

H. T. 1861.  
*Queen's Bench*  
 COLEMAN  
 v.  
 CORK AND  
 YOUGHAL  
 RAILWAY.

(a) 3 C. B., N. S., 189.

(b) 20 Law Jour., N. S., Q. B., 426.

(c) 3 C. B. 705.

(d) 1 Exch. Rep., N. S., 720.



H. T. 1861. to enlarge the time, because he thought it unnecessary to do so; so  
*Queen's Bench* that remission by the Court would be useless.

COLEMAN

v.

CORK AND  
 YOUGHAL  
 RAILWAY.

*O'Riordan*, in reply, was not called on by the Court.

LEFROY, C. J.

In this case, Mr. Serjeant *Sullivan* relied upon the prohibitory clause as a ground on which he resisted our sending back this award to be amended. It may be observed that those prohibitory words were written either before or after the Common Law Procedure Amendment Act 1856, s. 11, became law. If they were written before it became law, the law deals with them precisely as if there were no prohibitory words; and if afterwards, it is impossible for two parties to shut out, by their contract, the operation of the law;\* I would therefore dispose of the prohibitory clause by that observation. But, in reference to what has been urged by Mr. *Roper*, upon the general subject, here was a case in which parties referred certain matters to arbitration. These matters involved questions of law and questions of fact; and instead of referring the case to one arbitrator to decide upon the law and the facts, they chose to have two arbitrators—one to decide the law, and the other the facts; but no award, that is to say, no final award, could be made, which did not include of necessity a decision upon the law and upon the facts. But, although we have here an award which imports to be a final award, it does not appear in terms to have been made upon the law and upon the facts; and without a decision on both it could not be final. Therefore, it struck us very early in the case that this is in truth a mere omission in the drawing up of the award, and that the error is not a substantial error; but only that what must have taken place was not stated, as it ought to have been stated, in terms; and therefore we were very early of opinion that the award ought to be remitted, for the purpose of having this superficial error corrected. But it was strongly contended that this Court had no jurisdiction to remit the award, because the period named by the parties within which the time for making the award might be enlarged has elapsed.

\* See *Horton v. Sayer* (4 Exch. Rep., N. S., 643).

On abundant authority, I am satisfied that we have the jurisdiction; which is to be exercised however in a manner which will qualify the remission of it, so as to prevent this sort of authority being abused, namely, by limiting the time in which the amendment of the award shall be made. We will qualify our order in that way, as was done in another case; and direct the amendment to be made within one calendar month.

H. T. 1861.  
*Queen's Bench*  
 COLEMAN  
 v.  
 CORK AND  
 YOUGHAL  
 RAILWAY.

O'BRIEN, J.

There is no doubt that the award is defective, in not stating the decision of the arbitrator upon the questions of law which were referred. I am however of opinion that we have full power to send back the award to the arbitrator for reconsideration, so that the defect may be amended. The 11th section of the Common Law Procedure Act (1856) enacts—[His Lordship read the section]. These words are very comprehensive, and I do not think that our authority under them is limited in the manner contended for by defendant's Counsel. The case of *Morris v. Morris* (a), decided on a corresponding section of the English Procedure Act, shows that it applies, not merely to compulsory references, made under the preceding sections, but also to references made upon consent (such as the reference now before us). Serjeant *Sullivan* however further relies on what has been called the prohibitory clause in the submission, and on the negative words used therein, as precluding the Court from now exercising its power under that section, inasmuch as the period limited by that clause (10th January 1861) has expired. In my opinion however the clause has no such effect.—[His Lordship read the clause.]—It appears to me that this clause has only the effect of depriving the arbitrators (so far as they are concerned) of the power of enlarging beyond that period the time for making their award, but that it does not affect the extensive power given by the 11th section to the Court, to remit the matters referred, &c., “at any time, and from time to time,” without prescribing any limit; and I do not see upon what grounds we could hold that the parties, by the insertion of such a clause, had excluded the operation of the statute.

(a) 6 El. & Bl. 383.

H. T. 1861.  
*Queen's Bench*  
 COLEMAN  
 v.  
 CORK AND  
 YOUGHAL  
 RAILWAY.

The case of *Hodgkinson v. Fernie (a)*, which was relied on by defendant's Counsel, does not, in my opinion, concern the present. The question, whether the fact of the time limited for making the award having expired was an answer to the motion to send back the award, did not arise in that case. The matter of controversy was as to the sufficiency of the grounds relied on for remitting the award; and any observations made by the Court, as to their having only the same power under the corresponding English Act which they had before, should be considered as having regard only to the sufficiency of the grounds of remission relied on, and as deciding that the Court should not send back an award upon a ground on which they would not have done so before the passing of that Act. I need not refer to the cases relied on by the plaintiff, as we have, in my opinion, clear authority under the statute for the decision to which we have come.

HAYES, J.

I entirely agree with the LORD CHIEF JUSTICE and my Brother O'BRIEN in thinking that the Court should remit this award to be amended by the arbitrator. The law has given us full power to interfere; and, if so, I do not see why we should not exercise that power in this case.

FITZGERALD, J.

I also agree that we have power under the Common Law Procedure Amendment Act (Ireland) 1856, s. 11, to remit this award to the arbitrator to be amended; and that, in this particular case, we wisely exercise our authority in so remitting it. We remit the award, not to be re-considered, but in order that Mr. Forsythe may have an opportunity to insert his decision, or to state that the demurrer was abandoned. Either the demurrer was abandoned, or, if not, I cannot have a doubt in coming to the conclusion that Mr. Forsythe did form his opinion, and give it on the question of law; and the award is in reality going back to him to have inserted in it that which the arbitrator really did.

Motion granted.

(a) 3 C. B., N. S., 189.

H. T. 1861.  
*Queen's Bench*

THE QUEEN, at the Prosecution of JOHN CONNELL,

v.

THE JUSTICES OF THE PEACE OF THE  
 COUNTY OF DUBLIN.

Jan. 22, 24,  
 25.

IN Michaelmas Term 1860 (November 20th), this Court, notwithstanding the cause shown, made absolute a conditional order for a writ of *certiorari*, directed to Henry Alexander Hamilton and John Baker, two of the Justices of the Peace in and for the county of Dublin, to remove into this Court "all and singular records of "conviction or convictions, information or informations, and other "proceedings whatsoever, touching a certain assault or assaults, "whereof, on the complaint of one Jane Murphy, John Connell "was, on the 3rd day of July 1860, convicted by or before you, the "Justices, together with all things touching the same, by whatever "name or addition the said John Connell may be esteemed or called "in the same."

Summary conviction (made by two Justices out of Petty Sessions) quashed, because it did not appear on the return to a writ of *certiorari*, to remove the conviction, &c., that the now prosecutor (the defendant in the Court below) was in fact unable to give bail for his appearance at Petty Sessions.

A writ of *certiorari* issued accordingly, and the said Justices made a return of "all and singular a certain conviction, together "with the warrant of committal made by us, as such Justices, on "the 3rd day of July 1860, upon a complaint, made on such last-mentioned day, before us, out of *Petty Sessions*, at Balbriggan, "in the county of Dublin, by one Thomas Murphy against one "John Connell, for that he, John Connell, at Balbriggan, did "assault one Jane Murphy, being the daughter of the said Thomas Murphy; and we further certify that, after having examined upon "oath the said Thomas Murphy, the said Jane Murphy, one "Rebecca Moyce, and one Jane Moore, and having fully heard "both parties, and the said John Connell not having then tendered "or offered any bail to us for his appearance at Petty Sessions, we

*Semble*—That it is the duty of two Justices, acting out of Petty Sessions, to take the initiative, and require the defendant to give bail.

*Semble*—That, on the argument on the return to a writ of *certiorari*, reference cannot be made to the affidavits used on the motion to make absolute the conditional order for the writ.

*Quare*—Is an order or conviction, though drawn in exact conformity with the form sanctioned by the Lord Lieutenant in Council, pursuant to the statute, legal, if it does not state the fact which gave jurisdiction to the Justices?

H. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

"then and there convicted the said John Connell of an assault upon the said Jane Murphy, a copy of which conviction is hereunto annexed. And thereupon we issued a warrant for the committal of John Connell, the original of which warrant is also hereunto annexed. And we further certify that, on the same day, the said H. A. Hamilton made and entered, in one of the books kept in and for the district of Balbriggan, a copy of the substance of the proceedings so had before us, which entry is initialed by us, and dated the 3rd day of July 1860; and a copy of which entry is hereunto annexed, whereunto we have subscribed our names. And we further certify, that we have hereunto annexed a copy of the original sheet of the said Petty Sessions order-book, and are ready to produce the originals of the said books when required. And we further certify, that there does not exist, and never existed, any other record, warrant, order, or any other document, touching in any manner the said complaint or the proceedings thereon. In witness whereof, &c."

From the evidence annexed to the return, it appeared that, at the time when the assault was committed, the complainant, who was Quartermaster of her Majesty's 7th Regiment of Foot, was lodging with his two children in the prosecutor's house, and, being under order to rejoin his regiment in India, had arranged that his children should continue to lodge there. The complaint was heard on the 3rd of July, and the complainant, having to start for India on the following day, had substituted a charge of a common assault on his daughter in the place of a felonious assault on her, with which he had at first charged Connell.

The now prosecutor then applied to the Justices to send the case to the Quarter Sessions or to the Commission. The complainant begged of them to decide the case summarily, as he had to start for India on the morrow, and could not leave his daughter to travel thither alone.

The Justices decided that the case should go on, and convicted the prosecutor.

The remainder of the evidence was not material to the present

## Order-Book, as approved of by the Lord J

1.	2.	3.	4.	5.	6.	
No	Date of order.	Name or names of Justice or Justices by whose order made; and if made out of Petty Sessions; or if entry in this book, made upon a certificate, same to be here stated.	Parties complainant and defendant; the Christian and surname, rank, occupation, or other addition, and residence (stating parish and townland), to be given; and the parties to be distinguished by prefixing their appellation—complainant or defendant.	Names of witnesses examined, and whether for complainant or defendant.	Cause of complaint, as set forth in the summons.	P di w ov th cc m ev ar & w pr m pa so w l et as in co.
4.	3rd of July 1860	Henry A. Hamilton, Esq., John Baker, Esq.; out of Petty Sessions.	Thomas Murphy, Quartermaster of the 7th Royal Fusiliers, complainant; John Connell, publican, Balbriggan, parish of Balrothery, defendant.	Thos. Murphy, Jane Murphy, Rebecca Moyce.	That John Connell, the defendant, did assault Jane Murphy, on Friday evening, the 29th of June 1860, in the town of Balbriggan, in the county of Dublin.	To six ha

Note.—No erasure to be on any account made, and every interlin



argument, save in this particular, that an inference might have been drawn from the evidence that the now prosecutor would, if required, have been able to give bail for his appearance at the Petty Sessions.

On the 22nd of December 1860, it was ordered "That the subject matter of said return be set down in the Crown List, for argument in the ensuing Hilary Term."

Sixteen points of objection to the conviction were noted for argument by the now prosecutor. In substance, the objections to the validity of the conviction amounted to this:—That it did not show any jurisdiction in the Justices to make it, nor disclose any facts which show the existence of such a jurisdiction; and, in particular, that it did not state or show that the said John Connell was unable to give bail, to appear at the Petty Sessions, to answer the complaint mentioned in the conviction.

*W. J. Sidney* and *R. Armstrong*, in support of the objections to the return.

It appears on the face of the return that the Justices heard and decided this case out of Petty Sessions. The 14 & 15 *Vic.*, c. 93, s. 8, deprives all Justices in Ireland of jurisdiction to hear or determine, out of Petty Sessions any case not included in the enumeration contained in the second subdivision of that section. The Justices say that they had jurisdiction under the clause "It shall be lawful for two Justices, if they see fit, to hear and determine out of Petty Sessions any complaint as to any offence, when the offender shall be unable to give bail for his appearance at Petty Sessions." Therefore, unless the prosecutor was unable to give bail, the proceedings were had *coram non judice*. Wherever the jurisdiction of Justices is of a circumscribed character, the special circumstances which create it must be expressly stated on the face of the proceedings. The only circumstance which, in this case, could create the jurisdiction was inability on the prosecutor's part to give bail. The return contains no statement of such inability; but merely says—"John Connell not having then tendered or offered bail." The burden of tendering bail does not lie on a defendant. It is the duty of the Justices to take the initiative and require him to give bail;

H. T. 1861.  
*Queen's Bench*

THE QUEEN  
v.

JUSTICES OF  
COUNTY OF  
DUBLIN.



H. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 JUSTICES OF  
 COUNTY OF  
 DUBLIN.

and, if they omit to do so, the proceedings are all had *coram non judice*; and the submission of the defendant cannot create a jurisdiction, for the jurisdiction is the creature of an express statute, and cannot be conferred by the acquiescence or the consent of parties. The Justices, out of Petty Sessions, had no jurisdiction to hear the case until evidence had established that the defendant was unable to give bail. No such evidence was required by the Justices, or given by the complainant. But it appears from the return that John Connell was a householder, so that his ability to give bail was manifested to the Justices. The inability to give bail cannot now be presumed except by necessary intendment; and the jurisdiction of the Justices to hear the case must appear on the face of the conviction: *Paley on Conviction* (ed. 1856), pp. 26, 148, 157; *Rex v. Hazell* (a); *Kite and Lane's case* (b); *In re Peerless* (c); *The Queen v. Fuller* (d); *The Queen v. Bolton* (e); *The Queen v. The Justices of the Queen's County* (f).

*Whiteside, H. Ormsby, and Exham, contra.*

The conviction is good, although the inability of the defendant to give bail does not appear on its face. The 14 & 15 Vic., c. 93, s. 21, prescribes the manner in which the Justices are to keep the Petty Sessions order-book; but does not provide that the book shall contain any statement concerning the giving or tendering of bail by a defendant. Had such a statement been necessary, the form of order sanctioned by the Lord Lieutenant in Council would have contained a column for it. The order, being in exact conformity with that form, is therefore good. No doubt the Justices' jurisdiction, if it be of a limited nature, must appear on the face of the conviction; but it is not necessary that mere matter of procedure—and the inability of a defendant to give bail is nothing else—should also be stated there. *The Queen v. The Mayor of Clonmel* (g) decided that the 14 & 15 Vic., c. 92, and the 14 & 15

(a) 13 East, 139.

(b) 1 B. & Cr. 101.

(c) 1 Q. B. 143.

(d) 2 D. & L. 98.

(e) 1 Q. B. 66.

(f) 7 Ir. Com. Law Rep. 438.

(g) 9 Ir. Com. Law Rep. 267.

*Vic.*, c. 93, must be construed together. The 14 & 15 *Vic.*, c. 93, s. 16, sub-sec. 2, shows that the old rule of law, as to the admission of a defendant to bail, has not been interfered with, and that he must still apply for that privilege: 2 *Hale's Pl. Cr.*, c. 14, p. 123; *Hawkins' Pl. Cr.*, bk. II. c. 15, s. 14; 1 *Nunn & Walsh's J. P.*, p. 399. No summons was issued against John Connell; yet he attended before the Justices, submitted to their jurisdiction, was fully heard, and convicted. The defendant's appearance before the Justices, though not summoned, gave them jurisdiction: *The Queen v. Millard (a)*. After such a submission, the Court cannot set aside the conviction: *Full v. Hutchins (b)*; *Cave v. Mountain (c)*. If the complainant had not tendered any evidence, the defendant might have demanded from the Justices a certificate, which would have barred all further proceedings: *Tunncliffe v. Tedd (d)*. The conviction is legal, because it is within the provisions of the 14 & 15 *Vic.*, c. 93, as to cases out of Petty Sessions; is in the exact form prescribed by the Lord Lieutenant in Council; good on its face; and within the general jurisdiction of the Justices. Further, the conviction cannot be quashed, because the matter relied upon to defeat it is mere matter of procedure. Lastly, the application must be refused, because the prosecutor cannot now question a jurisdiction to which he submitted.

H. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

*Armstrong*, in reply.

The law, as laid down by *Hale* and *Hawkins* with respect to bail, is unquestionable in all cases in which the Justices have not a jurisdiction over the subject-matter of the complaint at Common Law. In such cases, the Justices have a discretion to grant bail or refuse it; and the 14 & 15 *Vic.*, c. 93, sec. 16, is merely declaratory of the Common Law, and relates only to a case which ought to be sent to a Superior Court. In that case, it would be a defendant's duty to ask for bail. But section 16 does not contemplate the case of a summary conviction, which must be governed by the 8th section, sub-sec. 2, which omits all reference to an application by a

(a) 22 Law Jour., N. S., Mag., Cas. 108.

(b) Cowp. 422.

(c) 1 M. & G. 257.

(d) 5 C. B. 553.

H. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 JUSTICES OF  
 COUNTY OF  
 DUBLIN.

defendant, and gives the Justices a jurisdiction above the Common Law. The Judge of an Inferior Court, who hears a case, must take care that the facts which create his jurisdiction exist. Therefore the Justices acted at their peril, since they did not ascertain that the defendant was in fact "unable to give bail," in the express words of the statute. The 14 & 15 Vic., c. 93, was passed to effect two great objects:—to give publicity to all proceedings at Petty Sessions; and to prevent a complainant choosing the Justices who are to decide his case. In criminal cases, a defendant cannot consent to matters against his own interest: *Lawrence v. Wilcock* (a); *Lisimore v. Beadle* (b); *Montgomery v. Byrne* (c). Those cases show that, even in civil cases, consent of the parties will not confer jurisdiction, if the jurisdiction of the Court is derived from a statute. Therefore, the consent and submission of the defendant could not enable the Justices to defeat the policy of the Act—the attainment of Justices indifferent between the parties, and of open trials. In all the cases cited at the other side, the Courts had acted within their jurisdiction; and the question was, whether an error in procedure had been committed? As to the form of the order, sections 21 and 36 must be read together; and the order-book must contain the particulars of each case, the substance of the decision, and the facts which give jurisdiction; for these are of the very essence of the case.

*Cur. ad. vult.*

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LEFROY, C. J.

In this case, we have thought it right to look very attentively into the evidence, to ascertain whether there was sufficient from which it might be fairly inferred that the jurisdiction which, by the first clause of the second paragraph of section 8, is taken away, except in a few enumerated cases, had been restored. It is restored in certain cases by a subsequent part of the section: the first clause is this:—"It shall not be lawful for any Justice or Justices to hear "and determine any case of summary jurisdiction out of Petty

(a) 11 Ad. & El. 941.

(b) 1 Dowl., N. S., 566.

(c) 2 Ir. Com. Law Rep. 230.

"Sessions, except cases of drunkenness or vagrancy, or fraud in the sale of goods, or disputes as to sales in fairs or markets." Then that part of the section is followed by these words:—"It shall be lawful for two Justices, if they shall see fit, to hear and determine out of Petty Sessions, any complaint, as to any offence when the offender shall be unable to give bail for his appearance at Petty Sessions." Now, by the first part of that section the jurisdiction is taken away in all but the excepted cases; and the case in which there has been a conviction here is clearly not one of those excepted cases. Therefore, on the face of the conviction there is a want of jurisdiction. But it has been argued that that jurisdiction which was taken away by the first part of the section is restored by the second part. That proposition can only be made out by its appearing with the same clearness, and with equal certainty, that it is restored by the second part, as that with which it appears that the jurisdiction was taken away by the first part. Is there then enough, either upon the record of the proceedings here, or upon the evidence at length, to show clearly and substantially that the offender was unable to give security to appear at the Petty Sessions? It is said that his neither having given nor tendered bail was a waiver of his right; that it was the offender's duty to do so; and that the circumstance of his not having done it, was evidence from which we may infer that he was unable to give it. Now, whether it was his duty to do so is a very doubtful question indeed; but that is not the matter on which the question in this case turns; for the Act of Parliament (14 & 15 Vic., c. 93) does not use the words with respect to the offender's tendering or giving bail, but restores the jurisdiction only upon the fact of his inability to give it. Now, is there enough on this record, or on the whole of the evidence (and I have looked through it attentively), from which we can infer the offender's inability to give bail, when we take the whole of the evidence together?

It appears, from the statement of the prosecutor in the Court below, that this offender, John Connell, was a householder, in such a position in life as appears to have induced and determined the prosecutor in the Court below to leave his children under the care

H. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
**v.**  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

H. T. 1861.  
*Queen's Bench*

THE QUEEN  
v.

JUSTICES OF  
COUNTY OF  
DUBLIN.

of Connell and of Connell's wife. To infer therefore from the evidence an inability to give bail, such as would restore their jurisdiction to the Magistrates, is what we cannot do. We therefore think that, whatever inference might be drawn from the circumstance that the offender has not tendered bail, that inference is repelled by evidence going distinctly to the fact of his ability, more than it is upheld by any inference that can be drawn from other circumstances. It appears therefore that on the face of the record there is a want of jurisdiction. Unquestionably, speaking for myself, I would feel very glad if, consistently with the principles of law, I could have found a means to avoid quashing this conviction; and I trust that, if this miscreant should dare to present himself before a jury, they will give him a very significant token of their estimate of his merits.

O'BRIEN, J.

I am also of opinion that the conviction or order of the Justices should be quashed, as there appears upon the face of the return to have been a want of jurisdiction in the Magistrates to make it. Without reference to the question whether Connell has suffered any actual injury from the course adopted by the Magistrates, or might not have received a severer punishment if tried before another tribunal, I think the question involved in this case is one of considerable importance, as affecting the administration of the law by the Magistrates. The conviction was for an assault, and appears to have been made by two Magistrates, though "out of Petty Sessions," upon the ground (as stated in the return) of "Connell not having then tendered or offered any bail to the Magistrates for his appearance at Petty Sessions." Now, it is expressly provided by the Petty Sessions Act (14 & 15 Vic., c. 93, s. 8, part 2) that "It shall not be lawful for any Justice or Justices "to hear and determine any case of summary jurisdiction *out of* "*Petty Sessions*, except cases of drunkenness or vagrancy, or fraud "in the sale of goods, or disputes as to sales in fairs or markets." If the statute stopped here, the Magistrates could have had no jurisdiction whatever to have heard and determined the complaint

in this case "out of Petty Sessions." But the subsequent part of the section enacts that "It shall be lawful for two Justices to hear and determine out of Petty Sessions any complaint as to any offence *when the offender shall be unable to give bail* for his appearance out of Petty Sessions." The inability of the offender to give bail is thus, under the statute, the foundation of the Magistrates' jurisdiction to hear and determine out of Petty Sessions such a complaint as in this case; and therefore, according to the settled rule of this Court, in relation to the proceedings of tribunals of limited jurisdiction, such inability should appear upon the face of the return. It is contended by the Justices that, if a party in custody on any charge desires to be admitted to bail, it is incumbent on him to apply for the purpose, and to tender the bail; and that it is not the duty of the Magistrates to require him to do so; and that, in the present instance, the inability of Connell to give bail is to be inferred from the statement in the return of his "not having tendered or offered any bail." But this statement does not satisfy the express terms of the statute. The fact of Connell not having tendered or offered bail does not establish that he was unable to give it. His omission to make the tender may have proceeded either from ignorance of his right to be admitted to bail, or from some other cause; and it is not the mere omission to tender bail, but the inability to give it, that is requisite under the statute to restore to the Magistrates the power of determining the case out of Petty Sessions; a jurisdiction of which they were deprived by the preceding part of the section. If indeed the return stated that the Magistrates had required Connell to give bail for his appearance at Petty Sessions, or had apprised him of his right to do so, and that he had declined to do so, then it might be contended that his inability to give bail was to be inferred from such a statement; but, even assuming this argument to be well founded, there is no such statement in the return before us. With respect to the doctrine of a party in custody being bound to tender bail, instead of the Magistrates being bound to demand it, there is no doubt that such obligation exists in cases where the right of being admitted to bail is given to the party as a privilege, and where he would otherwise be liable

H. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

H. T. 1861.  
*Queen's Bench*

THE QUEEN  
 v.

JUSTICES OF  
 COUNTY OF  
 DUBLIN.

to be committed to prison to take his trial; and it is to cases of this description that we are to apply the doctrine laid down in the passage cited from 2 *Hale's Pleas of the Crown*, pp. 123 and 124, where he states "that the Justice is not bound to demand bail; but "the prisoner is bound to tender it; otherwise the Justice may com- "mit him."—[See also 2 *Hawkins*, c. 15, s. 14, nearly to the same effect].—But this doctrine is not applicable to the case now before us, where the omission of the party to tender bail is not relied on as justifying the Magistrates in committing him to prison, to take his trial for the offence with which he was charged; but as giving the Magistrates jurisdiction to "hear and determine" the case out of Petty Sessions: a jurisdiction which, as I have already observed, is given to them only in the event of the party being "unable to give bail" for his appearance at Petty Sessions, to take his trial there. This view of the case is confirmed by reference to the 16th section of the Petty Sessions Act. The first part of that section provides that, in case of a person charged with any of the felonies or misdemeanours therein specified, it shall be discretional with the Justices either to commit him to gaol to take his trial, or to admit him to bail to appear and take his trial, as the Justices shall think fit; and the second part provides that, in case of a person being charged with any other "*indictable*" misdemeanour, the Justice "shall, *upon* "the application of such person (and being satisfied as to the suffi- "ciency of the bail offered), admit him to bail as aforesaid." By this section therefore the right of a party charged being admitted to give bail to take his trial, instead of being at once committed to gaol for the purpose, is given to him as a privilege, upon the express condition of his applying for it; and, in such a case, there is no doubt that the doctrine laid down in the passages cited from *Hale* and *Hawkins* would apply. But the 8th section deals with a different class of cases: it gives the Magistrates summary juris- diction to hear and determine, out of Petty Sessions, complaints against offenders in cases where they otherwise would not have had it. The language of the two sections is accordingly very different. The 8th section states nothing of the party charged making any "*application*" to be admitted to bail, as is done in

the 16th section, but speaks only of his being "*unable to give bail*." H. T. 1861.  
 We cannot suppose that such a difference between the language of *Queen's Bench*  
 the two sections was without an object; and it appears to indicate THE QUEEN  
 the intention of the Legislature that the mere omission to tender v.  
 bail which would, under the 16th section, justify the committal JUSTICES OF  
 of the party to prison to take his trial, should not be sufficient COUNTY OF  
 under the 8th section to authorise the hearing and determination DUBLIN.

of the case by the Magistrates out of Petty Sessions. It was the manifest policy of the Act that the extensive summary jurisdiction thereby given to the Magistrates should, whenever it was practicable and expedient, be exercised by them only in Petty Sessions; that the practice (so liable to abuse) of charges being determined by them out of Sessions should be checked; and that they should be prevented from doing so, except in the event, provided for by the 8th section, of the party being unable to give bail for his appearance at Sessions. I think also that the Magistrates, before hearing and determining any case under that provision, should apprise the party charged of his right to have the case disposed of at Petty Sessions, if he so desired it, and if he gave bail for his appearance there; and that the Magistrates should not proceed to determine the case until it appeared that the party was unable to give such bail. If the party, being able to give such bail, should refuse to do so (an event not likely to occur), then the Magistrates may commit him for trial at the next Petty Sessions.

The Counsel for the Magistrates further contend that the affidavits used upon the former motions for granting the *certiorari* show that Connell was unable to give bail, and that he waived the objection now relied on, and consented to the immediate determination of his case. A question was raised as to our power, upon this argument, to refer to those affidavits; and I was at first inclined to think that the case of *The Queen v. Bolton (a)* was an authority for our doing so. Upon reference to that case however, I find it was heard on *motion* to make absolute a rule *nisi*, for quashing the order of the Justices, which had been brought up on *certiorari*; and

(a) 1 Q. B. 66.



H. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
*v.*  
 JUSTICES OF  
 COUNTY OF  
 DUBLIN.

that affidavits were made and relied on by both parties respectively, for the purpose of sustaining and opposing that motion. The present case however has been set down as a law argument for hearing on the *certiorari* and return; and I am therefore of opinion we cannot refer to the affidavits; but, even if we did so, I do not think they establish either the *inability* of Connell to give bail, or any such waiver or consent on his part. I may further observe that, in a criminal case, the Court would be reluctant to act upon the ground of waiver or consent, and to hold that Magistrates thereby acquired a jurisdiction not given to them by the statute.

For these reasons, I am of opinion that we are bound to quash this conviction, as made contrary to the provisions of the statute; and that we should do so notwithstanding any opinion we may entertain, from the affidavits, of the demerits of the applicant.

HAYES, J.

I entirely concur in the sentiments so well expressed by the LORD CHIEF JUSTICE, as to the conduct of the prosecutor. But in a case in which nothing but a dry question of law is involved, we must be careful that we do not let our feelings usurp the place of our judgment. The simple question then is whether, upon the face of the record before us containing the writ, the return to it, and the conviction referred to therein, there is enough to show that the Justices were authorised to do what they did? I think not. The writ of *certiorari* was issued in exercise of the power inherent in this Court to supervise the proceedings of all Inferior Courts, and to see that they do not transcend their jurisdiction. Upon receiving the writ, it became the duty of the Justices to put on the face of their return all the facts and circumstances which showed their authority, and so constituted their justification. That principle of law is as old as the case of *Ladbroke v. James* (a), which decides that in pleading, by way of justification, the judgment of a Court of limited jurisdiction, every fact necessary to give the Court jurisdiction must be set forth; and, although that was the case of a plea, I apprehend that the very same principle which governs the case of a

(a) Willes's Rep. 199.

plea applies to a return. Now do we, looking at this return, find within its four corners a sufficient justification of the proceedings of the Justices? I think not. The complaint is, that the Justices have dealt with this case out of Petty Sessions, and without having any authority so to do. In answer to that, it was the duty of the Magistrates to set forth, on the face of the return, such facts and circumstances as would bring them within some of the exceptions in the statute 14 & 15 *Vic.*, c. 93, s. 8, par. 3. The exception pointed at is, that the present prosecutor was unable to give bail for his appearance at Petty Sessions. Have the Justices returned that he was unable? In this return, which they have made, and which I believe to be fair and candid, and to the letter true, the utmost they can say is, "that the said John Connell not having tendered bail," they proceeded to convict. But, in a matter affecting jurisdiction, it was the duty of the Magistrates to have inquired of the party whether he would give bail. If, in answer to that, he alleged his inability, but not until then, the Magistrates were authorised to proceed in the adjudication. The facts requisite to give them jurisdiction do not appear on the face of the record; and therefore this conviction in my opinion cannot stand.

I think it right to advert here to another matter, namely, the form of conviction itself. It was argued that the conviction was bad, because it did not appear on the face of it, as set out in the order-book, that the party was unable to give bail; but, as the law now stands in Ireland, I am disposed to think that was not necessary. There is no doubt that in England, where matters are still left under the old law, the Judges have decided that everything which is necessary to support the conviction must appear on the face of it. But, in this country, the duty of the Justices is fairly and truly to return, under certain prescribed headings, the several matters therein referred to; and the statute (14 & 15 *Vic.*, c. 93, s. 21, par. 1), declares that such entry, when duly signed, "shall be deemed, to all intents and purposes, a conviction or order, as the case may be." There is no heading in the form which would suggest a statement of the ground of jurisdiction; and therefore it occurs to me that the conviction, having followed the statutory form;

H. T. 1861.  
*Queen's Bench*  
THE QUEEN  
v.  
JUSTICES OF  
COUNTY OF  
DUBLIN.

H. T. 1861. is unimpeachable on that ground; but still the principle that the jurisdiction must be shown on the face of the return to a writ of *certiorari* remains untouched. In England, it must appear, not only in the return, but in that part of the return which is called the conviction.

*Queen's Bench*  
**THE QUEEN**  
 v.  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

FITZGERALD, J.

I also concur in the opinion that this conviction must be quashed, but I forbear to say anything upon the merits of the case, because those merits are not properly before us: save, I should be very happy, if the law permitted, to support the decision of the Justices, because they appear to have acted quite *bona fide*. I would not have made any observation in this case, had it not been that questions of great practical importance, and which go far beyond this particular case, are now before the Court. We are working out, by means of this Act of Parliament, a great public policy, which is, that there shall be no private proceedings before Justices in the exercise of their summary jurisdiction; and further, that the prosecutor shall not have the power of selecting the Judges who are to try his own case. The Petty Sessions are open to every Justice of the county; and therefore, no complainant can tell who will be the Justices presiding when his case comes on to be tried. But if a complainant is at liberty, out of Petty Sessions, to take a case before Justices in their private houses, he has then not only a private trial, but also the selection of Judges. The Act prohibits Justices from determining cases under their summary jurisdiction, except at Petty Sessions. But in order to provide for exceptional cases which might arise, and in order to obviate the necessity of committing the accused to prison, it contains a provision in case of the party accused. The statute says in one section (8) that, if "the prisoner shall be unable to give bail;" and, in another section, if "he shall be unable to find or to procure bail," the Justices may, in certain specified cases, dispose of the charge summarily. That provision was manifestly intended to provide especially for cases in which the accused party is, in the first instance, brought up before them on a warrant. In such a case, two Justices out of Petty

Sessions may think it a case to be disposed of at Petty Sessions, but that it is not safe to allow the accused party to go at large in the meantime. If the Justices think that the accused party ought not to go at large, and if he is unable to give bail for his appearance at Petty Sessions, then they must either commit him to prison for safe keeping, or dispose of the case summarily. If the defendant is unable to give bail for his appearance at Petty Sessions, the Justices may, in their discretion, hear and determine the case summarily; but until it appears that he is unable to give bail, they have no jurisdiction to determine the case. But how can it appear that the defendant is unable to give bail for his appearance at Petty Sessions until the Justices tell him, as they should tell him, that it is his right to give bail if he pleases? And the Justices, in the performance of their duty, should have given him an opportunity to give or find bail. We have before us the return which has been made by the Justices. It does not detail all the facts, but I have not a doubt as to how this case arose. There is one passage in the return which shows that the charge was originally a charge of a felonious assault. But in the course of the proceedings before the Justices, it turned out that, if the case was sent forward to the Quarter Sessions, the prosecutor could not then attend, as he was to start for India on the following day. Therefore the prosecutor applies to have the case disposed of summarily, and the defendant asks to have it sent to the Quarter Sessions. No one can look at the return without saying that this was the case; and its defect consists not only in this, that the jurisdiction is not shown on the face of the return; but also in this, that the circumstances actually negative the existence of this jurisdiction. We have no discretion in this case. The law is, that where the jurisdiction is of a limited nature, that jurisdiction must appear on the face of the proceedings. In this case, the jurisdiction does not appear. On the contrary, it is excluded; and therefore we must quash this proceeding. The case comes before us as matter of strict law; and I agree in the judgment of the other Members of the Court that this conviction must be quashed.

H. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**JUSTICES OF**  
**COUNTY OF**  
**DUBLIN.**

E. T. 1861.  
*Queen's Bench*

JAMES MILO BURKE v. BLAKE.

*April 17.*

Three grantors, and each of them, by deed, granted, &c., released, &c., to the plaintiff, three several plots of ground, "with all and singular ways, paths, and passages." —*Held*, that the release in the deed was a release by each grantor of his rights of way over the plots conveyed by his co-grantors.

THIS was an action to recover damages for alleged trespasses, committed by the defendant on the plaintiff's lands, situated at Dalkey, in the county of Dublin.

At the trial, the defendant relied only on that defence which claimed a right of way by immemorial usage, for the purposes of taking water from a certain well (situated on the plaintiff's land), to the defendant's premises at Mount Alverno.

The plaintiff proved his title to the lands, by a deed of conveyance of the 4th of August 1836; it was made between the Rev. Francis Smyth of the first part, Thomas Kiernan of the second part, Thomas Doyle of the third part, and James Milo Burke, the plaintiff, of the fourth part.

The deed, after reciting that J. M. B. had agreed with F. S., T. K., and T. D., for the absolute purchase of the fee-simple and inheritance of the several plots, pieces, and parcels of ground hereinafter mentioned, and of their, and each of their several and respective estates and interests therein; and that the said F. S., T. K., and T. D., have, and each of them hath, hereby agreed to assign and convey all their right, title and interest, in the several plots, pieces, and parcels of ground, tenements, hereditaments, and premises, unto the said J. M. B., for and in consideration of the price or sum of £317, free of all incumbrances whatsoever; and also for and in consideration, &c., witnessed that, in consideration of the said sum, paid in certain parcels to the three grantors by J. M. B., every of them, by these presents have, and each of them hath, granted, bargained, sold, remised, released and confirmed; and by these presents do, and each of them doth, grant, bargain, sell, alien, remise, release and confirm, unto the said J. M. B. (in his actual possession), &c., all that and those the several plots, pieces, and parcels of land following (setting out each plot by itself, with its boundaries);

with all and singular, moors, bogs, waters, watercourses, *ways, paths and passages*, timber and timber trees, &c.; and the reversion and reversions, remainder and remainders, &c. To have and to hold all and singular the said several plots, pieces and parcels of land, with their, and every of their rights, members and appurtenances, unto the said J. M. B., his heirs and assigns, &c. And the deed also contained covenants for good title, quiet possession, and further assurance.

E. T. 1861.  
*Queen's Bench*

BURKE  
v.  
BLAKE.

The defendant derived his title to the premises of Mount Alverno from the Rev. Francis Smyth, who had owned them when he conveyed to the plaintiff, by the deed of the 4th of August 1836, lands lying between them and the sea, on the shore of which the well was situated; and it appeared that, on the 19th of May 1860, the defendant and his servants broke gaps in the stone walls (recently erected) which inclosed the plaintiff's lands, and so opened a path from Mount Alverno to the well. Many witnesses were examined, on both sides, as to the existence, in former times, of a path leading directly from Mount Alverno to the well, and as to its use for the purpose of bringing water from the well to Mount Alverno. On these points there was a direct conflict of testimony. The LORD CHIEF JUSTICE, in his charge, withdrew from the consideration of the jury the deed of the 4th of August 1836; and told them, that the only question they had to consider was, whether there was at any time a right of way from Mount Alverno to the well, for the purpose of taking water; and that, to warrant a finding that there was such right of way, they should come to the conclusion that it was used without interruption for twenty years. His Lordship reserved leave to the plaintiff to have a verdict entered for him, if, on the true construction of the deed of 1836, the Rev. Francis Smyth could not, after having executed it, exercise the right of passage over the plaintiff's land; or if, on the whole case, the Court above should be of opinion that a verdict for the plaintiff ought to have been directed.

The jury found that the right of way had existed; and his Lordship then directed a verdict to be entered for the defendant.

In Hilary Term 1861, the Court granted a conditional order

E. T. 1861. that the verdict had for the defendant at the Sittings after the  
*Queen's Bench* last Michaelmas Term, before the LORD CHIEF JUSTICE, be set  
 BURKE aside, and a verdict entered for the plaintiff, pursuant to the leave  
 v. reserved by the LORD CHIEF JUSTICE.  
 BLAKE.

*P. J. Blake* and *G. O. Malley*, now showed cause.

The question depends upon the construction of the deed of the 4th August 1836. The deed operates as if each of the grantors had executed to the plaintiff a distinct and separate deed of grant of his own plot of ground. The deed must be construed *reddendo singula singulis*. The general words do not amount to a grant by all the grantors, and a confirmation by all of them, with a renunciation by each, of all his rights over the lands of the other grantors. The grant of all "ways, paths, and passages," was never meant to extinguish existing rights of way. If it had been intended to extinguish the right of way over the parcel conveyed by Doyle, Smyth and Kiernan would have renounced it in express terms; the actual extinction of the right of way would have been expressed in the body of the deed.

Serjeant *Sullivan*, Serjeant *Armstrong*, *Heron*, and *W. J. Sidney*, appeared for the plaintiff; but the Court called on—

*Malley*.

The release of all claims is no doubt a joint release; and, if read *per se*, must unquestionably have the effect of obliging the defendant to release this right of way. But the release must be read in connection with the recitals which announce the objects and intentions of the grantors. The general words of the release must be restrained by the particular recitals, just as a general release of a debtor, by his creditors, from all actions debts, claims, and demands, releases only the respective debts, and all actions and demands touching them: *Payler v. Homersham* (a). The recital of the objects of the parties, limits the general words to the specific thing granted. In the present case, Smyth had a right of way over Doyle's land; and from the absence of a specific reference to the right of way, and

(a) 4 M. & Sel. 423.

each of the grantors having in express terms granted his own plot of ground separately, it seems to have been their intention to confine themselves to that which they have expressly put on the face of the deed.

E. T. 1861.

*Queen's Bench*

BURKE

v.

BLAKE.

LEFROY, C. J.

The argument which has been last urged is a *felo de se* as to this case, because here there is nothing on which this general release, *qua* release, can operate, if it does not operate on the land of all the parties. For if it is a release from each of the grantors of a right of way over his own land only, it cannot pass by the grant of his own land; and therefore, the only way by which he could debar himself of it was, by the operation of a release applicable to the lands of the other grantors, and which did not apply to his own lands. Therefore the argument, which is drawn from the analogy of a general release by a creditor, of all claims, debts, and demands, following the recital of a specific sum of money being due, fails, because in that case there *is* an object upon which the general release can operate. But here the release, if it does not apply to the right of way over the lands of the other grantors, can apply to nothing. And how can that effect be avoided by any such observation as that the parties intended to grant each the rights appertaining to his own parcel of land, and not those which he exercised over the lands of his co-grantors? Every deed must operate according to its legal effect and operation; and every man who executes a deed is intended by the law to know and understand its legal operation and effect, and is as much bound by it as if it contained in express terms a recital of the purpose and object for which he executed it. Here the right of way is of very serious import; and therefore, according to the rules of law, the defendant cannot be heard to say that the grantor (under whom the defendant claims) did not understand the operation and effect of his deed. The verdict had for the defendant must therefore be set aside, and a verdict entered for the plaintiff.



E. T. 1861.  
*Queen's Bench*

# KEALY v. TENANT.

April 29.

The *Judge*, at the trial, is to decide whether the evidence of a constructive delivery of goods bargained and sold, is sufficient to satisfy the Statute of Frauds.

**NEW TRIAL MOTION.**—Action to recover damages in respect of the loss and expense consequent upon a re-sale of cattle sold to the defendant.

The writ of summons and plaint contained three paragraphs. The first paragraph stated that the plaintiff bargained and sold to the defendant twelve heifers, at the price of £10. 17s. 6d. each, upon the terms that the plaintiff should there deliver the said heifers to the defendant, and that the defendant should accept the same, and pay the said price for the same on delivery. General averment of the performance by the plaintiff of all conditions precedent. Breach, non-acceptance and non-payment, “whereby the plaintiff incurred divers expenses in keeping and finding the said heifers, and in re-selling the same; and also a loss upon the re-sale of the said heifers.” Second paragraph:—That the plaintiff bargained and sold to the defendant twelve heifers, at the price of £10. 17s. 6d. each, upon the terms that the plaintiff should forthwith deliver to the defendant the said heifers, and that the defendant should thereupon pay the price, as aforesaid. Averment:—That the plaintiff, in pursuance of the said contract, forthwith delivered to the defendant the said heifers, and the defendant then and there branded the same with his trade-mark, to indicate thereby that the said cattle were then, and by force of the said sale and delivery, the cattle of the defendant. General averment of the performance by the plaintiff of all conditions precedent. Breach:—Non-payment, whereby, &c. The third paragraph claimed a sum of £100, as due upon accounts stated.

The defendant traversed each paragraph.

The action was tried before the LORD CHIEF JUSTICE, at Naas, during the Spring Assizes 1861.

From the plaintiff's evidence it appeared that, on the 31st of

January 1861, he brought a lot of twenty-one heifers and bullocks to the fair of Athy; and, having first taken out of the lot three heifers which were in calf, agreed to sell twelve of the other heifers to the defendant, at £10. 17s. 6d. each. One C, who stood by helping the sale, marked the letter "T" on the twelve heifers, with raddle. The plaintiff swore that this was done by the defendant's direction. Defendant went away, and after some time returned, and said that the cattle did not answer him. On being asked to pay for them, defendant refused to pay unless he got a warranty that the heifers were not in calf. This was the first mention made about their being in calf, except as to the three above-mentioned. Plaintiff refused to give the warranty, and, two days afterwards, sold the twelve heifers for £9. 15s. 0d. per head.

E. T. 1861.  
*Queen's Bench*  
**KEALY**  
 v.  
**TENANT.**

On cross-examination, he admitted that his own man had remained in care of the cattle all along; and the man, on cross-examination, said that the cattle remained in the same place in the fair all the time, before the sale and after.

Defendant's Counsel called upon the LORD CHIEF JUSTICE to nonsuit the plaintiff, upon the ground that there was no evidence of a delivery, receipt, and acceptance, to satisfy the Statute of Frauds. His Lordship refused to do so, as plaintiff's Counsel cited the case of *Hodgson v. Le Bret (a)*.

The defendant then deposed that the plaintiff engaged the cattle free of calf; that he (the defendant) then went away, and, upon his return, said, "Your engagement must be in £5 a-piece." The plaintiff refused to engage them at all, and the defendant refused to take them without an engagement.

The LORD CHIEF JUSTICE, in his charge, told the jury that the question in the case was, as to the delivery; that, if the marking had been considered, by all the persons concerned; as a parting with the possession, it might be entitled to consideration; and that, if they thought possession had been given by the plaintiff to the defendant, they should find for the plaintiff.

The jury found a verdict for the plaintiff.

(a) 1 Camp. 233.

E. T. 1861.  
*Queen's Bench*

KEALY  
v.  
TENANT.

*G. Battersby*, on a former day in this Term, obtained a conditional order to set aside the verdict, and for a new trial, on the grounds of misdirection; that the verdict was against evidence, and against the weight of evidence.

*J. T. Ball* (with him *O'Driscoll*) showed cause.

The first question is, whether it was within the province of the jury to decide that the sale was complete, although there was no payment, no earnest-money, nor any memorandum in writing? The question of what is a constructive delivery, under the Statute of Frauds (29 Car. 2, c. 3), is a question for the jury. The delivery need not be actual or positive: *Elmore v. Stone* (a); *Dodsley v. Varley* (b). The jury is to decide whether there was a constructive delivery: *Bushel v. Wheeler* (c); *Hodgson v. Le Bret* (d); *Anderson v. Scott* (e). The jury found affirmatively, that there had been a constructive delivery. Once the jury find that affirmatively, their verdict cannot afterwards be disturbed by the Court. An acceptance of the cattle by the defendant was also proved. Any exercise of ownership, such as marking the cattle with the initial letter of the buyer's name, is equivalent to an acceptance. An appropriation of the goods is evidence of an acceptance as well as of a delivery: *Chaplin v. Rogers* (f). After acceptance, the purchaser may object to the quality of the goods: *Edan v. Dudfield* (g); *Morton v. Tibbett* (h).

*G. Battersby* (with him *Dames*), in support of the conditional order, was stopped by the Court. He cited *Baldey v. Parker* (i); and *Carter v. Toussaint* (k).

*O'Driscoll*, in reply, cited the judgment of Campbell, C. J., in *Parker v. Wallis* (l). The defendant was not justified in direct-

(a) 1 Taunt. 458.

(b) 12 Ad. & El. 632.

(c) 15 Q. B. 442, n.

(d) 1 Camp., N. P., 233.

(e) *Ibid.*, note.

(f) 1 East. 192.

(g) 1 Q. B. 302.

(h) 15 Q. B. 429.

(i) 2 B. & Cr. 37.

(k) 5 B. & Ald. 855.

(l) 5 El. & Bl. 21.

ing a third party to mark the twelve heifers with the initial letter of his name, and thus prevent the plaintiff from selling them to another purchaser. It is true that the plaintiff's servant remained in charge of the cattle all along; but he was the agent of the defendant, to keep them for him.

E. T. 1861.  
*Queen's Bench*

KEALY  
v.  
TENANT.

LEFROY, C. J.

I should be acting against the very distinct opinion which I entertained at the trial, if I should now hesitate, with the concurrence of all my learned Brothers, to set aside this verdict, and order a new trial to be had. Substantially, I think that the *Court* ought to decide the question, which, at the trial, I did not take upon me to decide against the authority of the case—*Hodgson v. Le Bret (a)*—which was cited to me then, by the Counsel for the plaintiff. If that case had not been cited to me, I should have nonsuited the plaintiff; and that was my own opinion. But I said at the trial that I thought it was a fit case to reserve for the opinion of the Court above, on account of the authority which had been cited, and which, it now turns out, was overruled. And therefore it was, in substance, a case reserved for the opinion of the Court above, and should be dealt with accordingly. The verdict must therefore be set aside, with costs, and a new trial had.

(a) 1 Camp., N.P., 233.

T. T. 1861.  
*Queen's Bench*

THE QUEEN at the Prosecution of JAMES BARKER junior,  
 v.

W. E. STEELE, Registrar of the Branch Council for Ireland  
 under "The Medical Act."\*

May 27, 28.  
 June 10.

When the Registrar of the Branch Medical Council inserts in, and afterwards, by order of such Branch Council, and without notice to the party registered, strikes out of the register the description of a qualification which the evidence produced to the Registrar by the claimant did not show that he had obtained, the Court will not by mandamus compel the Registrar to re-insert such description.

**MANDAMUS.**—In last Easter Term, the prosecutor obtained a conditional order for a writ of mandamus, "directed to the said William "Edward Steele, commanding him, as Registrar of the Branch "Council for Ireland under 'The Medical Act,' to restore the "entry in the local register for Ireland, under said Act, of the "name and qualification therein of the said James Barker junior, "to the same state as such entry was originally made by the said "W. E. Steele, as such Registrar; and that he do insert in the "said register the letters 'M. D.,' struck out therefrom by him "without authority in that behalf; or that he enter on said register "as part of the medical qualifications of the said James Barker "junior, as a licentiate of the King and Queen's College of Physi- "cians in Ireland aforesaid, the words 'as Doctor of Medicine,' "after the word 'licentiate' in the column of said register entitled "Qualification."

The conditional order was granted on the prosecutor's affidavit, which stated that the deponent had received, from the King and Queen's College of Physicians in Ireland, its diploma or license, dated the 27th of April 1860, testifying that he had, on examination, proved himself learned and skilled in medicine, and granting him license to practise in medicine; that the Branch Medical Council for Ireland had elected W. E. Steele as their Registrar,

\* Before LEFROY, C. J., HAYES, and FITZGERALD, JJ.

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[NOTE.—O'BRIEN, J., was present during part of the arguments; but having, in consequence of indisposition, been absent during the remainder of them, took no part in the judgment].

who, as such Registrar, having been satisfied by proper evidence that the deponent was entitled to be registered in the Local Medical Register for Ireland, pursuant to the "Medical Act," as a Licentiate of the College of Physicians, and as a Licentiate of the Royal College of Surgeons in Ireland, on the 7th of February 1861, entered in the said Local Register the name, address, and qualification of the deponent, as follows:—

T. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**STEELE.**

Date.	Name.	Residence.	Qualification.
7th February 1861.	Barker, James, jun.	24 North Cumberland-street.	Lic. & M. D., K. Q. Col. Phys. Ireland 1860. Lic. R. Coll. Surg. Ireland 1859.

and that the letters "M. D." in said entry were meant to express that he was a Licentiate as Doctor of Medicine of the King and Queen's College of Physicians in Ireland.

At a meeting of the Branch Council for Ireland, held on the 16th of February 1861, the following resolution was carried by the casting vote of the chairman:—"That, the Registrar be directed to expunge from the Local Medical Register for Ireland the title of "M. D., which has been illegally attached to the names of the "following persons" (of which the deponent's name was one); "and "that he be required henceforward to conduct the local register "in strict accordance with the regulations of the General Medical "Council, and the provisions of the Medical Act, and refuse for "the future to register the title of M. D., of the College of Physicians." In obedience to that resolution, the Registrar immediately struck out the letters "M. D.," without notice to the deponent. On the 29th of April 1861, deponent caused the Registrar to be served with a notice requiring him to amend the entry in the terms of the conditional order, and stating his intention to apply for a writ of mandamus in default of compliance with the notice. On the 1st of May 1861, deponent in person produced his diploma to the Registrar, and required him to make the alterations: the Registrar refused to do so.

The affidavit further stated, that the College is empowered by charter to grant licenses to persons to practise in midwifery, and

T. T. 1861.  
*Queen's Bench*

THE QUEEN  
 v.

STEELE.

also licenses to practise as persons learned in medicine or physic; and that, from the date of the charters, all Licentiates of the latter class have been publicly known and designated as Doctors of Medicine or Doctors of Physic, and are so called and recognised by several public Acts of Parliament; and that such distinction is an important and necessary part of their qualification. And that, inasmuch as the Medical Act in its preamble states its object to be "That persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners," it is necessary that the particular nature and extent of the qualifications and medical titles conferred on Licentiates of the said College, whether as Doctors in Medicine, or as Licentiates in Midwifery, only, or in both, as the case may be, should appear on the medical registry; and that the omission to state such qualification of the deponent as a Doctor of Medicine, or Doctor in Physic, or as a learned practiser in physic, or learned Physician (all of which deponent believes are convertible terms, having the same meaning), on the said Medical Register, is and would be injurious to the deponent.

The Registrar, in his affidavit filed as cause, stated that, in pursuance of a resolution of the Branch Council, passed on the 29th of December 1860, authorising him so to do, he inserted in the Local Register the letters "M. D.," after the name of every applicant who required him to do so, and who was a Licentiate of the King and Queen's College of Physicians; that he transmitted those names to the Registrar of the General Council, whom he requested to copy into the general register, the qualifications of the said Licentiates as entered in the local register, with the addition of "M. D." to their respective names; and that the Registrar of the General Council, in his reply, dated the 6th of February 1861, said that the executive committee of the General Council was advised that the King and Queen's College of Physicians had no power to grant the title "M. D.;" that, if it had, that qualification was not enumerated in "The Medical Act" schedule A, and therefore, could not be registered; that he would not copy the letters "M. D." into the General

Register, as it was an entry in the Local Register on its face erroneous; and that he was instructed by the executive committee of the General Council, to request that such entries may be struck out.

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

When this reply was laid before the Branch Council, they passed the resolution of the 16th of February 1861, in compliance with which deponent expunged the letters "M. D.;" and deponent says that those letters were intended to express that the person to whose name they were attached was a Doctor of Medicine.

The license given by the College of Physicians in Ireland to the prosecutor, was in these terms:—"Omnibus ad quos literæ præsentibus pervenerint salutem. Nos, Præses et Socii Collegii Medicorum Regis et Reginae in Hiberniæ [name], quum examinatione solenni, de more instituta, se doctum et rei medicæ peritum probasset, Licentiam medicinæ exercendæ, quamdiu se bene gesserit, legibusque hujusce Collegii obtemperaverit, plene quantum in nobis est permisimus, et auctoritate regiarum chartarum nobis in istum finem concessarum confirmavimus.

"Quod sigillo nostro communi affixo et nominibus nostris subscriptio testamur."

*Brewster* (with him *Jellet*) showed cause.

This conditional order cannot be made absolute; first, because no qualification, except those mentioned in the Medical Act, can be inserted in the register, and the qualification which the prosecutor seeks to have inserted is not one of those enumerated in the statute; secondly, because, even if this was a statutable qualification, the prosecutor has not got the qualification which he asks to have inserted after his name. He is a Licentiate of the King and Queen's College of Physicians in Ireland, but that does not entitle him to add to his name the letters "M. D.," as an equivalent for "Doctor of Medicine," because that imports a *degree*. His diploma has not given him a degree, even if the College of Physicians had power to grant one. The 21 & 22 Vic., c. 90, s. 14, directs the "Registrars to keep their respective registers in accordance with the provisions of this Act, and the orders and

VOL. 13. 51 L



T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

"regulations of the General Council." Therefore the prosecutor requires the Registrar of the Branch Council for Ireland to violate the Act—first, by inserting on the register an illegal qualification, which, even if it were legal, the prosecutor has not got; and, secondly, by disobeying the "order" of the General Council, which, the letter of the 6th February 1861 shows, directed the letters "M. D." to be struck out. Every qualified person is entitled, by section 15, to have appended to his name, in the register, every qualification which he has got, and which is recognised in the Act; and, in order to secure the correctness of the register, the 18th section directs the Colleges and Bodies in the United Kingdom, mentioned in schedule A, to give to the General Council, upon requisition, all the information necessary for the verification of the claims to be registered. The prosecutor therefore is entitled to have entered on the register only some one or more of the statutable qualifications which he has actually obtained. Schedule A contains an enumeration of all the qualifications in respect of which a man can be registered. The prosecutor is already registered under qualification No. 3. No. 10 includes "Doctor of Medicine;" but only when that qualification has been obtained from some University of the United Kingdom, or the Archbishop of Canterbury. It is not pretended that the prosecutor has obtained a qualification from any such source, or that his case is provided for by No. 11. But the prosecutor claims to be registered as Doctor of Medicine, because the Licentiates of the King and Queen's College of Physicians in Ireland are recognised as such in several public statutes, and are publicly called Doctors of Medicine. No doubt, the 1 G. 3 (*Ir.*), c. 14, and the 40 G. 3 (*Ir.*), c. 84, make use of such phrases as applied to those licentiates; but, when so applied, they are used either in the technical sense of possessing the *degree* of Doctor, which the prosecutor has not got, either from a University or from the College of Physicians in Ireland (supposing that body to be capable of granting a degree), or as merely titular designations or descriptions conferred by popular courtesy or general custom, and therefore not within the meaning of the Act. Nothing titular

can be now inserted in the register; for, though there was, in the form given in schedule D of the Medical Act, a column for "title," that column has been repealed by the 22 Vic., c. 21, s. 3. Furthermore, by section 26 of the Medical Act, "no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the Registrar be satisfied, by the *proper evidence*, that the person claiming is entitled to it." What "*the proper evidence*" is, will be found in section 15, to be specified as "*the document conferring or evidencing the qualification, or each of the qualifications, in respect whereof he seeks to be so registered.*" Now the diploma, produced by the prosecutor to the Registrar, does not contain the qualification which he claims to have entered on the register, under the Medical Act: it only makes him a Licentiate of the College of Physicians in Ireland. If he chooses to obtain, in the regular way, from a University, a degree of M. B. or M. D., he can have it registered under section 30; but, until he does so, his claim cannot be conceded. His present registered qualification gives him all legal rights conferred by the statute; and the prosecutor, having but one of the qualifications specified in the Act, is not entitled to be registered, not only under that qualification, but also under others which he has not yet acquired.

T. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**STEELE.**

*J. E. Walshe and W. Smith, contra.*

The conditional order must be made absolute, on two grounds:—first, before the Registrar made the original entry, containing the letters "M. D.," he must have been satisfied by "proper evidence" that the prosecutor was entitled to have those letters affixed to his name; and, when the entry had been once made, the Registrar had no power to strike out those letters without having previously given notice to the party, so that he might appeal from his decision, under the 26th section. Therefore the Court is bound to issue the mandamus, in order that notice may be given to the prosecutor before the letters are again erased. No appeal lies from the decision of the Branch Council; so that the prosecutor has no remedy save by mandamus. If the Registrar

T. T. 1861. had been dissatisfied with the evidence produced to him, and made an entry which did not satisfy the prosecutor, he would have appealed, and then the entry might have been altered. But an entry, once made, cannot be altered, except after an appeal. Even the Branch Council cannot touch any entry, unless jurisdiction to do so is given to them by the bringing of an appeal. It was imperative that the prosecutor should have received previous notice: *The King v. Gaskin* (a); *The King v. The Saddlers' Company* (b): for there is no distinction, in that respect, between the case where a man has been deprived of a right, which he had properly obtained, and the case where a man has been deprived of a right which a competent tribunal awards to him, and afterwards discovers that it has made a mistake in so doing. The prosecutor has adopted the course which was taken in *Regina v. The Medical Council of England* (c).

Secondly, the College of Physicians had jurisdiction to grant the title, which was not used in the technical sense importing a degree, but merely as a sign descriptive of his being a qualified person. They have a right to attach to a man's name any form descriptive of his skill and competency; and, being a tribunal competent to do so, no other tribunal has a right to alter the description, unless there is a legislative prohibition of it. No doubt, the column of title, in the form in schedule D, is now abrogated; but the 22 *Vic.*, c. 21, while it repealed that column, left wholly unrepealed section 27 of the Medical Act; by the express terms of which the Registrar is bound to insert in the register "Medical titles . . . conferred by any Corporation or University;" and the College of Physicians in Ireland has conferred upon the prosecutor the title "Licentiate and M. D." Every person is bound to recognise and adopt that title, until it is shown to be illegal. The Registrar struck out the letters in obedience to the resolution of the Branch Council of Ireland. That resolution was wholly outside their jurisdiction; and, at all

(a) 8 T. R. 209.

(b) 6 Jur., N. S., 1113; S. C., 30 Law Jour., N. S., Q. B. 186.

(c) 3 L. T., N. S., 692.

events, the Court will grant the writ, in order that the prosecutor may have an opportunity to question the decision, and have the question decided by a proper tribunal, on appeal. On that principle the Court always acts, in the similar case of a man being deprived of an office without an opportunity of maintaining his right to it. When the Medical Act, section 14, directs the Registrar to keep the "register correct, in accordance with the provisions of this Act, and the orders and regulations of the General Council," it does not mean every casual order or direction, made for a particular case, as was the case here, but refers to the general orders which section 16 directs the General Council to frame, to regulate the keeping of the registers. Also, when section 15 authorises them to make "necessary alterations in the . . . qualifications," it refers to section 30; so that no alteration of a qualification can be made under sections 15 and 30 except in addition to, or substitution for, a qualification previously registered. Counsel also argued that the letters "M. D." ought to be retained on the register, as part of the prosecutor's qualification, because the phrase Doctor of Medicine, and equivalent phrases, have been, in different public statutes as well as by general custom, applied to the Licentiates of the College of Physicians in Ireland; and that that constituted a statutable recognition of the right of that body to employ that title, though not as importing a degree: 1 *G. 3 (Ir.)*, c. 14; 25 *G. 3 (Ir.)*, c. 42; 40 *G. 3 (Ir.)*, c. 84. Under the present qualification, as registered, the prosecutor does not possess all the rights given by the Medical Act: *Ellis v. Kelly* (a). The prosecutor's qualification is not stated to its full extent; and, in order to give the public full information, the qualification should be stated in its full extent, and the letters "M. D." should be inserted as an essential part of that qualification, though not as a separate and distinct qualification. The Court is bound, on the present motion, to presume that the Registrar acted legally in the first instance, and therefore to assume that the prosecutor was entitled to the appellation of "M. D.;" and grant a mandamus, in order that the remaining question—whether he has

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

(a) 6 Jur., N. S., 1119; S. C., 6 H. & N. 222.

T. T. 1861. a legal right to it?—may be solemnly decided on the return  
*Queen's Bench* to the writ.

THE QUEEN

v.

STEELE.

*Jellatt*, in reply.

The prosecutor says that he is entitled to the title "Licentiate of the College of Physicians" by diploma, and to the title "Doctor of Medicine" by courtesy and general usage; and is therefore entitled to have this composite qualification inserted after his name. But no qualification, save one or more of those enumerated in section 15 and schedule A, can be inserted; and "Doctor of Medicine" of the College of Physicians, or by courtesy, is not mentioned in the Medical Act. The Court cannot give to the word "qualification" any but the limited and defined meaning given to it in section 15 and schedule A. It was further contended that the Registrar, having once inserted a qualification in the register, cannot afterwards alter it without first giving notice to the party; but section 14 is imperative in its direction on the Registrars, "to keep their respective registers correct . . . . "and from time to time make the necessary alterations in the "addresses or qualifications." It is said that the entry should be restored to its original condition, in order that the prosecutor may appeal, under section 25, after notice; and that upon that ground the mandamus issued in *The Queen v. The Medical Council of England*. That case was wholly different, because the prosecutor there, holding under a degree from a Foreign College, could not be registered at first without the assent of the General Council, which he obtained. The Court held that he ought to receive notice, and have an opportunity of showing cause against the charge of infamous misconduct. In that case too the prosecutor's title to be put on the register was complete, by the decision of the General Council to admit him. But here the prosecutor never had any title to be registered as "M. D.;" and the fact of the Registrar writing those letters after his name could not confer on him the right to be so registered; for the Registrar acted in excess of his jurisdiction, which is strictly limited by the Act. Besides, the appeal given by section 25 is only an

appeal from the decision of the Registrar, refusing to insert what is within the Act. The Court is asked to command the Registrar to make an entry which would make the register incorrect. Every such act is expressly forbidden by section 14; and the Court will never issue a mandamus directing a person to do an act which an Act of Parliament prohibits him from doing: *The Queen v. The Justices of Cork* (a).

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

*Cur. ad. vult.*

LEFROY, C. J.

This case comes before the Court upon a motion to show cause against a conditional order for a writ of mandamus, which was obtained by a gentleman named Barker against the Registrar of the Branch Medical Council of Ireland, "requiring and directing him, as Registrar of the Branch Council for Ireland, under 'the Medical Act,' to restore the entry in the local register for Ireland under said Act, of the name and qualification therein of the said James Barker junior, to the same state as such entry was originally made by the said W. E. Steele, as such Registrar; and that he do re-insert in the said register the letters 'M. D.,' struck out therefrom by him without authority in that behalf; or, that he enter on said register, as part of the medical qualification of the said James Barker junior, as a Licentiate of the King's and Queen's College of Physicians in Ireland aforesaid, the words 'as Doctor of Medicine,' after the word 'Licentiate,' in the column of said register entitled 'qualification.'" In substance, the Registrar was required to show cause why he should not erase the name of Mr. Barker, as it now stands, and enter it in another form, with the prefix, or rather the addition to it, of the words "Medical Doctor," in addition to a portion of the description of qualification which

June 10.

(a) 7 Ir. Com. Law Rep. 249.

[NOTE.—The affidavits in this case also raised the question, whether the College of Physicians has the right of conferring *degrees*? This question was much debated during the argument. The Report however has been disembarassed of the facts and arguments touching that question, inasmuch as the judgment of the Court proceeded on other grounds.—REPORTER.]

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

was given originally. The name was entered originally as "James Barker junior, Licentiate of the K. & Q. Coll. Phys. Ireland." Afterwards, there was added to that description, by order of the Branch Medical Council for Ireland, the letters "M. D.," importing "Medical Doctor." By a subsequent order of the Branch Medical Council for Ireland, acting under the authority of the General Medical Council, that supplemental addition was discharged; and the name was directed to remain as originally entered. The application now before the Court is substantially for a writ of mandamus, not merely to restore the entry of Mr. Barker's name as a Licentiate and M. D., but also as "Licentiate and Doctor of Medicine of the King's and Queen's College of Physicians of Ireland, by their diploma." I think that these are exactly the facts.

We are all of opinion that this application cannot be complied with. Our Brother O'BRIEN heard a large portion of the argument, but was prevented by illness from hearing the rest of it; and therefore he does not take any part in this judgment; but, so far as he heard of the case, he was of the same opinion as the other Members of the Court who are now present, and who are very clearly of opinion, after a full consideration of the subject, that this application cannot be complied with; and that the cause shown against the conditional order should be allowed. We think that the application could not be granted consistently with the Act of Parliament under which it was made; and that, to comply with the prayer of this conditional order, would be to set aside the last legal order of the Branch Medical Council for Ireland, and to substitute in its place an illegal order; and we all think it will appear, from a statement of the Act (21 & 22 Vic., c. 90), that, having regard to its provisions, the effect of an order complying with this application would be what I have just stated. This Act is deserving of what, with all deference to the Legislature, I may say is a rare compliment. It is an Act drawn with peculiar accuracy. Its title is, "An Act to regulate the Qualifications of Practitioners in Medicine and Surgery,"—to regulate the qualifications, that is, the actual qualifications, which, according to this Act, will entitle them to privileges of which they were not compelled to avail themselves, but which they

are at liberty under, and entitled by, this Act to avail themselves of, if they think fit; and it will appear that the privileges of registry under this Act are of considerable importance. It may therefore very reasonably be expected that those who obtain the privileges of registry given by this Act, shall comply with its provisions; and that persons applying in fact for the benefit of the Act, shall comply with all its substantial conditions: and its conditions are enumerated with a precision and a distinctness which can leave no doubt or question whatever on the mind of any person who reads the Act, even with ordinary care and attention: but we have conned it over most carefully, and now entertain the opinion which I have stated. The title of the Act is what I have stated; and the Act, at the same time that it confers benefits on the medical profession, provides for the public a most desirable advantage. That object is contained in its recital—"Whereas it is expedient that "persons requiring medical aid should be enabled to distinguish "qualified from unqualified practitioners." That is the advantage which the Act proposes to attain for the public: we shall hereafter see the advantage given to the medical profession. The second section enacts that "This Act shall commence and take effect from the 1st day of October 1858." We shall see hereafter how that date becomes material. By the 3rd section it enacts that "A Council, "which shall be styled 'The General Council of Medical Education "and Registration of the United Kingdom,' hereinafter referred to "as the General Council, shall be established, and Branch Councils "for England, Scotland and Ireland respectively, formed thereout "as hereinafter mentioned." The Act then, by its 4th section, provides how the General Council shall be formed—"The General "Council shall consist of one person chosen, from time to time, "by each of the following bodies (that is to say):" the English electoral bodies, the Scottish electoral bodies, and thirdly (which is the material part of the section in the present case), the Irish electoral bodies;" stating who shall form the Branch Council for Ireland thus—"One] person chosen, from time to time, by each "of the following bodies—the King and Queen's College of Physicians in Ireland, the Royal College of Surgeons in Ireland,

T. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
*v.*  
**STEELE.**



T. T. 1861.  
*Queen's Bench*

THE QUEEN  
 v.

STEELE.

"the Apothecaries' Hall of Ireland, the University of Dublin, the "Queen's University in Ireland;" and one person nominated by her Majesty, with the advice of her Privy Council, and the President to be elected by the General Council. These persons are to constitute the Branch Council for Ireland. The General Council, which is to be formed of contributions from the Branch Councils of England, Scotland and Ireland, sits in England, and has a superintending, supervising, controlling and directing power over the Branch Councils. I shall now refer to such sections only of the Act as will enable us to give an effective answer to this application. It is observable that, by the 7th section, "Members "of the General Council representing the Medical Corporations "must be qualified to be registered under this Act." This, which is a special provision as to the representatives of Medical Corporations, is not inserted as to persons representing Universities; because persons representing Universities are persons holding of necessity under degrees; but the representatives of Medical Corporations do not hold under degrees; but they hold by their licenses; and therefore there is a special provision with respect to them; and in that respect it is material to consider the indications of an intention on the part of the Legislature, with respect to the privileges given especially to Universities, that this provision is applied to the representatives of Medical Corporations; because they may or may not have degrees, which alone would qualify them to be representatives of the body, or to be registered; and this provision therefore is clearly a strong indication of the intention of the Legislature to make a distinction between Universities and Medical Corporations, as they are called in the Act. The next sections of importance are the 10th and 11th, which provide respectively for the appointment of officers to the General Council and to the Branch Councils. These officers are to be Registrars, who are to act as Secretaries and also as Treasurers, unless another person is appointed to act as Treasurer. The next important section is the 14th, which prescribes the duties of the Registrars—"It shall be the duty of the Registrars to keep their respective registers correct." How correct?—"In accordance with

"the provisions of this Act, *and* the orders and regulations of the "General Council." They are first bound to act in accordance with the provisions of the Act; they are also bound to act under orders and regulations of the General Council; they were to erase the names of all registered persons who shall have died, and, from time to time, make the necessary alterations in the addresses or qualifications of the persons registered under this Act; so that, if a person once registered obtains a different qualification, in addition to that under which he was registered, they shall also enter that qualification on the register; provided always that it shall be lawful for them, if they shall apply by letter to any registered person, and get no answer, with respect to his address or other particulars, within six months, to erase the name of such person from the register: "provided always, that the same may be restored "by direction of the General Council, should they think fit to make "an order to that effect;" showing the superintending power of the General Council over the Branch Councils, and of course showing the legality of the acts of the Branch Councils done in conformity with the directions of the General Council. Then comes the most important section in the Act, the 15th—"Every person now possessed, and (subject to the provisions hereinafter mentioned) every "person hereafter becoming possessed of any one or more of the "qualifications described in the schedule [A] to this Act, shall, "on payment" of certain fees, "be entitled to be registered." It is not made, as I have already-observed, imperative on any medical person to be registered under the Act: but it enacts that he shall be "entitled" to be registered; and it prescribes the mode and form in which he shall be so entitled to be registered—"on "producing to the Registrar of the Branch Council for England, "Scotland or Ireland, the document conferring or evidencing the "qualification, or each of the qualifications, in respect whereof he "seeks to be so registered; or upon transmitting by post to such "Registrar, information of his name and address, and evidence "of the qualification or qualifications in respect whereof he seeks to "be registered, and of the time or times at which the same was "or were respectively obtained." Therefore, the Registrars must

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
*v.*  
 STEELE.

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

be satisfied, by proper evidence, of the qualification, "as contained in the document" produced to them; and, if a party gets any further or new qualifications, he may in like manner have them entered on the register, upon duly producing to the Registrar the document stating that qualification. The next thing of importance is the schedule A, referred to in that section; for it is the schedule which provides the qualifications in respect of which any person can claim to be registered under this Act; and from the schedule it appears that being a Fellow or a Licentiate of the King and Queen's College of Physicians of Ireland are two of the qualifications which entitle a party to be registered for Ireland. But to be registered how? According to the statement in the document evidencing the qualification, and produced to the Registrar. But the schedule afterwards proceeds to add further qualifications which will entitle a Physician to be registered for Ireland, "Doctor, or Bachelor, or "Licentiate of Medicine, or Master in Surgery, of *any* University "of the United Kingdom." That is a further title which, for England, Scotland or Ireland, will, besides being a Fellow or Licentiate of a Medical Corporation, entitle a man to be registered. Thus, there is a marked distinction taken between a "Doctor or Bachelor" of Medicine, which is a degree, and a "Licentiate;" because, although Medical Corporations cannot grant a degree by which a party can be entitled to be entered in the register under his diploma, as a "Doctor of Medicine;" they may give a license which entitles the party to be registered as a Licentiate of Medicine. But the distinction between such licenses and degrees conferred by a University is here taken, in the most distinct manner, by "Licentiate of Medicine" being also enumerated here as a qualification which Universities can give, besides the qualifications of Doctor and Bachelor of Medicine by degree; but the College of Physicians, which has not that privilege, cannot give a degree which will entitle a party to be entered on the register under this Act. If we are to abide by the terms of this Act, and by the distinctions taken in the schedule which is to regulate the application of the Act, they cannot give the degree of Doctor of Medicine, nor entitle the persons to anything further than a license, which does not import (as is evident

from the distinction taken by this schedule) the privilege of a Doctor of Medicine, or Bachelor of Medicine. Then comes this further enumeration of qualifications, marking also the distinction I have already adverted to—"Doctor of Medicine, of any Foreign or Colonial University or College, practising as a Physician in the United Kingdom before the 1st day of October 1858, who shall produce certificates, to the satisfaction of the Council, of his having taken his degree of Doctor of Medicine, after regular examination; or who shall satisfy the Council, under section 45 of this Act, that there is sufficient reason for admitting him to be registered." This relates to a person who had been antecedently practising under a degree of a Foreign University or College.

Having thus referred to that schedule, which is an index to point out exactly the qualifications which alone will entitle any person to be legally registered, and to have the benefit of a registry under this Act, the question then arises whether, in the present case any of these qualifications have been laid before the Court? But, before I proceed to apply the Act, I think it right to refer to some other sections of it. The 18th section enacts that "The several Colleges and Bodies in the United Kingdom, mentioned in schedule A to this Act, shall, from time to time, when required by the General Council, furnish such Council with such information as they may require, as to the course of study and examinations to be gone through in order to obtain the *respective* qualifications mentioned in schedule A to this Act," &c. I call attention to the phrase "*respective* qualifications," as one which shows that there is a distinction between the qualifications which, by the argument in this case, it was attempted to confound. Then comes the 25th section, which provides that, "Where any person entitled to be registered under this Act applies to the Registrar of any of the said Branch Councils for that purpose, such Registrar shall forthwith enter in a local register, in the form set forth in schedule D to this Act, or to the like effect, to be kept by him for that purpose, the name and place of residence, and the qualification or several qualifications in respect of which the person is so entitled," &c: and when I look at the column of qualifi-

T. T. 1861.  
*Queen's Bench*  
THE QUEEN  
v.  
STEELE.

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

cations in schedule D, I find them thus enumerated:—"Fellow of the Royal College of Physicians of —;" "Fellow and Member of the Royal College of Surgeons of —;" "Graduate in Medicine of University of —;" "Licentiate of the Society of Apothecaries;" "Member of College of Surgeons and Licentiate of the Society of Apothecaries." These are the qualifications. There was also a column for the title of the persons registered; but a subsequent Act (22 *Vic.*, c. 21, s. 3) enacted that "the fourth column of schedule D of the said Act, with its heading, shall be repealed and omitted." So that nothing titular is now entitled to be admitted by the Registrar: and, if there could have been any doubt upon the construction of the first Act, the repeal of this column by the subsequent Act is quite decisive that no title, however sanctioned by the generality of its use, or the length of time during which it has been conceded by the public, has any ground whatsoever for claiming to be registered under this Act. It was strongly argued that a Licentiate of the King and Queen's College of Physicians of Ireland, being *by public courtesy* addressed and spoken of as Doctor, is entitled by usage to be considered as a Doctor of Medicine, and to have under this Act the benefit of this popular designation, for it is nothing else. But the circumstance of this column of title, which might have been thought to give countenance to such a species of title being expunged from schedule D altogether, and the qualifications being now confined to those which I have mentioned, is quite decisive against such a claim. Then the 26th section contains negative words—"No qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the Registrar be satisfied, by the proper evidence, that the person claiming is entitled to it." The Registrar must be satisfied by the proper evidence, which, as I have already said, is the document produced to him under the 15th section; which document must contain a qualification conformable to some one of the qualifications mentioned in the schedule. And then here are negative words in the 26th section, that the Registrar shall not enter any person's name on the register who does not satisfy him, by a document produced, that he has a qualification such as is

required by the Act. The 26th section then goes on:—"And any appeal from the decision of the Registrar may be decided by the General Council, or by the Council for England, Scotland or Ireland (as the case may be); and any entry which shall be proved to the satisfaction of such General Council or Branch Council to have been fraudulently or *incorrectly* made, may be erased from the register, by order in writing of such Council or Branch Council." The phrase "or *incorrectly* made" at once puts an end to one of the arguments used here, that no authority could be found in the Act for the order of the Branch Council to erase the letters "M.D." The erasure of those letters was made by the order of the Branch Council of Ireland; and in this section we find explicit authority to make that order. In pursuance of that order, the Registrar erased the name altogether. Finally, it is said that that erasure was made without notice to Mr. Barker. Now, although it is going a little out of the way to take up that point at this stage, I will do so. It is quite evident that this was a patent objection, to which no evidence could be applied any other than that of the document itself, which was produced to the Registrar, and by which he was to ascertain whether there was a qualification agreeable to the provisions of the Act. That was a matter patent upon the face of the document. Either right or wrong, the schedule of the Act, and the document produced to the Registrar, when compared together, at once decided the question. There was no possibility therefore for the question being varied by any evidence *dehors* the document and the Act of Parliament; and therefore the case \* which was cited where Mr. Organ, upon an imputation of infamous conduct, in a professional respect, had his name erased without notice, was decided upon a collateral ground of matter of fact, and does not in the least apply here, where there was no ground whatsoever for giving Mr. Barker notice. The Act is imperative that, if the document produced does not comply with the Act, the name shall be erased. Therefore, the argument founded on the case of Mr. Organ, is entirely inapplicable to this case.

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

\* *The Queen v. Registrar Med. Council of England* (3 Law Times, N. S., 692).

T. T. 1861.  
*Queen's Bench*  
THE QUEEN  
v.  
STEELE.

I am now to mention the benefits which result to the medical body. The benefit of registration I have adverted to, so far as relates to the public, from the opportunity thus afforded to them of knowing and ascertaining that the persons so registered have the qualifications which entitle them to the confidence of the public. On the other hand, there are some special benefits given to the persons who are registered. They are entitled to bring actions for the recovery of their fees, with a power to the College of Physicians to inhibit the members of their body from bringing an action if they think fit, and so leaving the remuneration a *quiddam honorarium* if they choose. But no medical person is eligible to serve under public boards, who shall not have been registered under this Act. These are some of the benefits given to the medical profession: and as they are an inducement, no doubt, to persons to register themselves, so it is, on the other hand, of great value to the public that the qualifications should be ascertained strictly and accurately, according as the wisdom of the Legislature prescribed should be necessary to obtain the benefits conferred by this Act. One of the matters which were urged upon us was, that the present applicant has a diploma of license from the College of Physicians. But that is not one of the qualifications mentioned in schedule B. A license or a degree from the University are mentioned; but the very circumstance that the degree of Bachelor or Doctor of Medicine is considered and treated separately from a license; or that the degree of Bachelor or Doctor of Medicine is distinguished, when given by a University, from a Licentiate, is a circumstance also quite decisive to show that, although a University may make a party a Licentiate, yet also it shows that the circumstance of a party being a Licentiate of any other body, not being a University, cannot confer the privilege of a degree. This gentleman therefore, having nothing but a license, a diploma, to practise medicine generally, from a body not being a University, and not having the degree of a University, is not entitled to be entered on the register in the manner in which he claims to be entered; for he does not come within any one of the qualifications entitling him to be so registered. The circumstance that he may have imputed to him publicly and generally the appel-

lation of "M. D.," I have already adverted to. It cannot entitle him to be registered as "M. D.;" for it is but an empty title, if I may so say. Then he desires that he may be entered as a Licentiate of the College of Physicians; and that there shall be entered and appended to the entry of his name the letters "M. D.;" that is to say, that he shall be entered on the register as Doctor of Medicine. There is no such privilege given by schedule B to a person who has merely a license from the College of Physicians. He says that there is now a form of diploma which would entitle him to that privilege. But suppose that there be so, and that the College of Physicians has a right to grant a degree of Doctor of Medicine, yet they have not granted it to Mr. Barker. He has not brought before us any document substantiating any right whatsoever to the qualifications which he seeks to have entered. And, even though he may have the degree, and the College of Physicians had the power to grant it, it would not entitle him to have this order made absolute; because the Act is imperative that the document produced to the Registrar, and of course the document produced to us, must contain some one of the qualifications which are mentioned in schedule B. We cannot make for Mr. Barker an Act of Parliament; nor can we for him travel out of the Act made by the Legislature. We are all bound—the Court is bound, the Registrar is bound, the Branch Council is bound—by the special and distinct provisions of the Act, that no man shall be registered under this Act, except according to the qualifications contained in the document brought by him to the Registrar, and which must contain some one or more of the qualifications mentioned in the schedule. Nothing can be more explicit, distinct, or imperative. There are negative words in the 26th section, words negating any title whatsoever, except that which accords with the Act and the document complying therewith, which should be produced to the Registrar. Here there is no such qualification. The party comes to ask us to direct the Branch Council for Ireland to direct their Registrar to add to the entry in the register something which is neither in the document brought before him, or produced to us. It is impossible to comply in any such case with the application. The applicant fails to produce the primary quali-

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.



T. T. 1861. *Queen's Bench* fication. A titular qualification will not do: and for us to make a qualification for him is impossible.

THE QUEEN  
v.  
STEELE.

Perhaps it is unnecessary for us to say anything upon the subject of the claim of the College of Physicians to grant degrees. It is wholly unnecessary for our decision; and therefore, perhaps, we are not to be understood to pronounce peremptorily an opinion on that subject. We leave it open for them to have it discussed, if anything should occur to make further discussion upon it desirable. But, even if they had the power to confer degrees, they have not given a degree in this instance. There is no degree conferred by the document produced here; and therefore, we need not unnecessarily decide that question. We do not desire to go out of our way to decide it. Whatever impression we may have upon that subject, it has not been the turning point of the case; and therefore, we are not to be considered as concluding the parties by anything that passes now on that subject.

The only remaining topic is that argument which was attempted to be founded upon two Acts of Parliament, the 1 G. 3 (*Ir.*), c. 14, and the 40 G. 3 (*Ir.*), c. 84, in which, for the purpose of ascertaining certain matters in certain localities, a Licentiate of the College of Physicians is treated as and called a Physician. He is in those Acts treated and mentioned along with those who have the regular qualifications of Doctor of Medicine; that is, there is intrusted to him generally, the discharge of the same duties as a Physician is called upon to perform. That decides nothing as to the species; they are all Physicians: that is the name of the genus. But the species is here in the present Act, the class which was distinctly separated, so that we cannot, on that account, consider that as a legislative conferring of a degree. But, be that as it may, here is an Act which does not enumerate a degree conferred in that way; and there are no degrees recognised in it, except those of Universities. Indeed, in the course of the argument, my Brother HAYES took up that topic, and sifted it so closely and accurately that it would be quite unnecessary to add anything further now upon that point. Upon the whole, therefore, it appears to us, and so far as my own opinion goes, it appears to me for the reasons which

I have on my own behalf stated, that the cause shown must be allowed.

T. T. 1861.  
*Queen's Bench*

THE QUEEN  
v.

STEELE.

My Brethren will add to the reasons which I have stated, anything further which may occur to them; but we are all of opinion that the application to make this conditional order absolute must be refused.

HAYES, J.

I concur with the other Members of the Court in thinking that the cause shown against the conditional order of the 3rd of May 1861, for a mandamus, ought to be allowed.

Two points were made by Mr. *Walsh*, in argument:—

First.—That the prosecutor having been regularly registered, the Branch Council had no authority to interfere with that registration, save upon due notice to him; and that on account of that illegality, and altogether irrespective of merits, the mandamus ought to go. And, secondly; he contended that the College of Physicians had a right to grant the title of “M.D.”—not a degree in the ordinary sense of that term when we speak of University degrees, but in a certain popular sense in which the term has been understood, when applied to Licentiates of that College, as distinguishing them from Practitioners in Midwifery.

It appears that Mr. Barker, having been registered as “Lic. M. D., K. Q. Col. Phys. Ireland,” Dr. Steele, the Branch Registrar for Ireland, in obedience to a resolution of the Branch Medical Council, expunged the letters “M.D.,” without having given any notice of that proceeding to Mr. Barker. And the conditional order is to restore the entry in the local register to its original state; and that the Registrar shall re-insert in the register the letters “M.D.,” which were so struck out by him; or that he enter, as part of the Medical qualifications of James Barker junior, as a Licentiate of the King and Queen’s College of Physicians, the words “as Doctor of Medicine,” after the word “Licentiate.”

Upon the first point it has been strongly pressed upon us that, whatever may be the merits of this case, injustice has really been done to this gentleman, by a decision having been come to, in his absence, which materially affected his interests—that the Registrar

T. T. 1861.  
*Queen's Bench*

THE QUEEN  
 v.

STEELE.

being, by the Medical Act, charged with certain judicial functions, as to the entry of qualifications on the register, with a right of appeal to the Branch Council under section 26, the Registrar ought not to have proceeded, without giving due notice to the party affected; and having failed to do so, and that to the prejudice of the prosecutor, this Court ought now to interfere by issuing its mandamus to replace his name, and thus leave matters to be inquired into, and dealt with in their statutory course. I entirely agree with Mr. *Walshe*, that such is the course we ought to adopt, if there were really anything to be inquired into, beyond the matter of law which we have now before us for decision. But if there has been suggested to us no real question of fact to be determined, and if there is no question of law, save that which is mooted to us in argument on the present motion, it would be against all principle and practice to grant a mandamus on such a ground. Why should we order that to be done, which we clearly see must be afterwards undone? Perhaps the Registrar may have been under no legal obligation to obey the commands of the Council in making the alteration complained of; but if the command was to do an act which in itself was strictly legal, the maxim, *factum valet, quod fieri non debet*, at once applies, and forbids an interference.

The case of *Reg. pros. Dinsdale v. The Saddler's Co. (a)*, is strongly corroborative of this view. Mr. Dinsdale had there been admitted to an office of trust in the Corporation, upon a representation of his entire solvency: he soon afterwards became bankrupt, his estate paying 2s. 8d. in the £1. There was a law prohibiting the admission of a bankrupt or insolvent. He was expelled without notice given to him. A mandamus issued to restore him; a return was made alleging the bye-law and the insolvency, neither of which was traversed. The questions argued were, as to the validity of the bye-law, and as to the expulsion without notice. On the latter point, Martin, B., in pronouncing judgment, says:—"We should be very slow to allow the present writ of mandamus to issue, ordering the restoration to office of a person not qualified to hold it or to discharge its duties, who ought never to have

(a) 7 Jur., N. S., 138.

"been elected, and who never would have been elected, but for a T. T. 1861.  
 "mistake of fact on the part of the electors." *Queen's Bench*

THE QUEEN  
 v.  
 STEELE.

As to the second question, I am of opinion that the prosecutor has failed to show any title whatever as a Licentiate of the King and Queen's College of Physicians, to use the title of Doctor of Medicine; and even though he had established that, he has failed to show any right to have that title inserted on the register.

The object of the Legislature in passing the Medical Act was, as stated in the preamble, "To enable persons requiring medical aid to distinguish qualified from unqualified practitioners." And for this purpose the statute selects certain Colleges or Schools of Medicine, to one or other of which all medical practitioners, in order to entitle themselves to the benefit of the Act, must belong. These Schools or Colleges are, to a certain extent, placed under the surveillance of the Medical Council; so that if in process of time the course of education should degenerate in any of them, the matter may, after due inquiry by the Medical Council (s. 26), be referred to the Privy Council, by which last mentioned body the retrograding School or College may be debarred the privilege of sending its members for registration.

But while the several Schools mentioned in the Act shall preserve their status, all persons who have obtained the rank in those Schools which is specified in the statute shall, on payment of the statutory fee, be entitled to be registered; which is to be effected by insertion on the register, of their names, residences, and qualifications. It is true that by the Medical Act, it was allowed that "medical titles" should also be set forth on the register; but by the Act of the 22 Vic., c. 21, this last provision was repealed, so that now the name, residence, and qualification alone are to be registered. And by the express words of the 15th section of the Medical Act, it is only in respect of some "one or more of the qualifications described in schedule A," to the Act, that the party is to have the title to be registered. On referring to schedule A, the only qualification belonging to the College of Physicians is "Fellow or Licentiate of the King's and Queen's College of Physicians of Ireland;" and therefore, it is only as such Fellow or Licentiate that any person can, in respect of his connection with this body, show any right to registry. And no

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

matter how well founded the rights of those gentlemen may be to assume any other titles or honorary distinctions, yet since the passing of the 22 *Vic.*, titles are not to be registered; and the only qualifications to be registered are those specified in the schedule.

Now, I take this to be a complete answer to the present application. But as it has been strongly pressed in argument that Licentiates of the College of Physicians are entitled to the appellation of Doctors of Medicine, and therefore have a right to the insertion of this on the register as a part of their qualification, I shall venture a few words on the subject. It appears to me that this title of "M. D.," though it may be one very generally used by, and applied to, Licentiates of the College of Physicians, is one to which those gentlemen, *as such*, have no right. Those initial letters "M. D." have been introduced and used for the purpose of conveying, and have been long understood as conveying, that the party has obtained the degree of Doctor of Medicine from some University competent to bestow it. And if we were, by our decision, to countenance the use of those letters by persons who had not so obtained the degree of Doctor of Medicine, we would be giving a legal sanction to what was in fact a usurpation. It is true that Mr. *Walke* disclaims the use of those terms in their strict sense, as applied to University graduates, and seeks to invest them with a general and popular signification; but what right have we thus to misapply the terms, and, where called on to expound an Act made for the registry of medical practitioners according to their legal qualifications, to contravene the plain object and policy of the Act, by allowing parties to assume a designation to which they are not legally entitled, and thus to be active, though secondary, agents in the misleading of those for whose assistance the statute was enacted? And possibly it may have been some consideration of this kind that led to the repeal of the column as to titles. Perhaps the Legislature may have thought that the insertion of high-sounding titles, which, in the matter of medical skill, might be but "*vox et præterea nihil*," would tend rather to mislead than to guide the inexperienced inquirer.

In support of the right of the College of Physicians to grant, and of its Licentiates to assume, this designation of Doctor of Medicine, the Charter of the College and its diplomas have been referred to, as well as several Acts of Parliament, in which persons connected with the College of Physicians have been uniformly designated as "Doctors." I do not find in the Charter any authority whatever to grant any "degree in medicine," as that phrase is understood. It is true that that instrument recites an intention that an apt, proper, and legal Constitution and Corporation may be made and established, of grave, learned, able, and experienced "*Doctors*" and Practisers in Physic in Ireland; and grants that some fourteen persons, therein mentioned, and "all Doctors in Physic," shall be incorporated by the name of "The President and Fellows of the King's and Queen's College of Physicians in Ireland;" but, as I have said, no authority is given to confer degrees, but only to give licenses, admittances, approbations, and allowances, to act as Physicians or Practisers of Physic. And the Charter takes care, in its 28th and 29th sections, to make special distinction between such Licentiates and the Graduates in Physic of a University. In strict conformity with this view of the law is the diploma which has been given to the prosecutor, and which is the one that has been in common use until the year 1859, and after the commencement of the Medical Act. That instrument, after reciting that the party had, upon examination, proved himself to be "*doctum et rei medica peritum*," goes on to invest him with "*licentiam medicinæ exercendæ quamdiu se bene gesserit*." No doubt, in the year 1859, an alteration was introduced into the form, but that can have no effect in the consideration of this case. The Act of the 1 G. 3, c. 14, has been cited, as a legislative recognition of the right of Licentiates to the appellation of "Doctor," because the statute speaks of the College having power to admit into the fellowship of their body "such and so many other learned and worthy Doctors of Physic" as the President, Censor, and Fellows should from time to time judge necessary.

Now, it appears to me that any argument as to right and title, which rests on the circumstance of a casual designation occurring

T. T. 1861.  
*Queen's Bench*  
**THE QUEEN**  
 v.  
**STEELE.**

T. T. 1861.  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

either in a Charter or Act of Parliament, is not deserving of very serious consideration; but certainly its weight and importance, small as they may be, are wholly annulled when we are informed that, in the year 1695, a bye-law was passed by the College of Physicians, which required that every person, before being admitted a Fellow of that College, should be first admitted a Doctor of Physic in the University of *Dublin*; and that this bye-law continued in full force at the time of the passing of the Act of the 1 G. 3, as appears from the date of a document (15th Feb. 1761) referred to in the course of the argument, being a letter from the College of Physicians to the University of Dublin, threatening to admit other persons than those authorised by the bye-law of 1695.

The School of Physic Act (40 G. 3, c. 84) in its 15th, 19th, 20th, 42nd, and 45th sections, draws a marked distinction between those who have taken medical degrees and persons who have obtained a "license to practise" from the College of Physicians. Being therefore of opinion, upon the facts, as appearing before us in the affidavits and other documents, that the College of Physicians has no legal authority to grant the degree of Doctor of Medicine, or to authorise the use of any such designation or title—that Licentiates of the King and Queen's College of Physicians, though Physicians, and entitled to practice physic, have, as such Licentiates, no right to assume the title of "*M. D.*" or Doctor of Medicine, however it may from courtesy have been conceded to them; and, even though it were otherwise, that no such designation is specified in the statute as a qualification of those who are Licentiates of that body. I think that the cause shown against the conditional order ought to be allowed.

FFITZGERALD, J.

I concur in the conclusion at which the other Members of the Court have arrived. Upon the first question, as to the point of form of the conditional order, I clearly expressed my view during the argument that if we are satisfied, upon the question of law, that Mr. Barker is not entitled to have the letters "*M. D.*" appended to his name, we ought not now to grant a writ of mandamus to add

the letters "M. D." to the entry in the register, when we would be obliged immediately afterwards to command, by another writ of mandamus, that the same letters should be expunged from the same register.

T. T. 18 1  
*Queen's Bench*  
 THE QUEEN  
 v.  
 STEELE.

Upon the main question, I wish only to state that I found my judgment on the Medical Act, and on it alone. I do not think it necessary, for the purpose of the present motion, to express any opinion as to the question whether the College of Physicians have power to grant a degree. I found my judgment on the Act of Parliament; and it is sufficient to say that the document produced on the part of the applicant, even if the College of Physicians had power to grant a degree, is not a degree. My opinion on the case is expressed in two sentences. The applicant is a Licentiate of the King and Queen's College of Physicians in Ireland; and he is no more; he has been registered as such with the definition given by the statute; and he is not entitled to be registered in any other way. Those are my simple and narrow reasons. As one of the public, I may add that the complaint did appear to me to be founded upon an apprehension which was shadowy in the extreme. I understood that Mr. Barker pressed on us, as a reason why we should grant his application, that he, by reason of the omission of the letters "M. D." after his name on the register, fell in public estimation. I, as one of the public, say that we rather come to the conclusion that, in reference to the qualifications of a party, there could scarcely be a higher testimonial of fitness than the certificate of the King and Queen's College of Physicians, couched in the terms of the twenty-seventh and twenty-eight clauses of their Charter, that the party having been examined, tried and proved, has received their testimonial that he is an able, learned and qualified person; and their license to practise medicine. In my estimation, that license is, for the purpose of practising physic in this country, a testimonial of the highest character; and we, the public, never go on to consider whether he has a strict legal right to append the letters "M. D." to his name or not: he is a Doctor of Medicine in public estimation, and well learned in medicine, and entitled to practise as such.



H. T. 1862.  
*Common Pleas.*

HARE

v.

COPLAND, Public Officer of the Royal Bank of Ireland.

(*Common Pleas.*)

Jan. 27, 28.  
 May 6.

A summons and plaint alleged that A, the plaintiff, drew a cheque upon a banking company, requiring them to pay to S. and K., or their order, £190. 17s. 7d., the bank having at the time funds of A to meet same; that P. L. forged the signature of S. and K. as an endorsement on the back of said cheque, and presented same for payment to the bank; that said forged document was manifestly not in the handwriting of S. & K., or either of them, and was manifestly in the handwriting of P. L.; and that the respective handwritings of S. & K. and P. L. were well known to the servants and agents of the bank at their office when the same was presented for payment by P. L.; that the bank wrongfully cashed the cheque, and paid money of the plaintiff, to the amount of £190. 17s. 7d., to P. L.; and said money was so paid to P. L. by the gross negligence of the bank, &c. &c.—*Held* [CHRISTIAN, J., *dissentiente*] that, as the allegations in the plaint showed that the instrument in question was a draft for money payable to order, within the 16 & 17 Vic. c. 58, s. 19, and that it purported to have been endorsed by S. & K., and accordingly the bank was protected by statute, and the action was not maintainable.

THE summons and plaint stated that the plaintiff, before the time thereafter mentioned, had opened an account with the Royal Bank of Ireland, who then and still carried on the trade and business of bankers in Ireland; and plaintiff paid in divers moneys about £1000 to the said Royal Bank of Ireland, at their office at Foster-place, in the city of Dublin, which moneys they held to the order of the plaintiff, to wit, on the 12th day of July 1861. That, on the said 12th day of July 1861, plaintiff drew a cheque, directed to said Royal Bank of Ireland, and requiring them to pay £190. 17s. 7d., to Messrs. Stewart & Kincaid, or their order; that the said Royal Bank of Ireland had then, and thence hitherto have had, ample funds of plaintiff, about £500, to pay said cheque; and thereupon it became the duty of said Royal Bank to pay said cheque, when presented, only to said Messrs. Stewart & Kincaid, or to their order. That one Peter Lynch forged the signature of said Messrs. Stewart & Kincaid, as an endorsement on back of said cheque, and presented same for payment, to wit, on the 13th day of June 1861, at Foster-place aforesaid. That said forged endorsement is manifestly not in the handwriting of said Messrs. Stewart & Kincaid, or either of them, and is manifestly in the handwriting of the said Peter

Lynch; and the respective handwritings of said Stewart & Kincaid and Lynch were well known to the servants and agents of said bank at their office, when the same was presented for payment by the said Lynch, yet the said bank then wrongfully cashed said cheque, and paid money of the plaintiff, to the amount of £190. 17s. 7d., to said Peter Lynch; and said cheque was cashed, and said money of the plaintiff was so paid to said Peter Lynch, by the gross negligence in the premises of said bank, and their servants and agents in that behalf; and said Peter Lynch has absconded with said money; and said money has been thereby lost to the plaintiff, &c. &c.

H. T. 1862.  
*Common Pleas.*  
 HARE  
 v.  
 COPLAND.

Demurrer.—Because the cheque was a draft or order upon the Royal Bank of Ireland, payable to Messrs. Stewart & Kincaid, or their order; and it was the duty of said bank to pay same to any person who presented same for payment, with an endorsement purporting to be that of the said Messrs. Stewart & Kincaid, in pursuance of the 16 & 17 *Vic.*, c. 59.

That said count does not show any reason why the Royal Bank should be liable for having paid said draft or order, under the provisions of the said statute, to the person who presented same, namely, Lynch, though the endorsement of said Messrs. Stewart and Kincaid was forged.

*Exham* (with whom was *Macdonogh*), in support of the demurrer.

Before the passing of the 16 & 17 *Vic.*, c. 59, s. 19, it is clear that a banker paying on a forged endorsement would have remained liable to the customer: *Roberts v. Tucker* (a). So he would still, if he paid a cheque, the name of the drawer of which was forged. But the effect of the 19th section is to protect the banker, who pays the amount of a draft or order for money made payable to order on demand, provided it purport to be endorsed by the payee or subsequent endorsee. The 19th section enacts, that "Any draft or "order drawn upon a banker for a sum of money, payable to "order on-demand, which shall, when presented for payment, pur- "port to be endorsed by the person to whom the same shall be

(a) 16 Q. B. 560.

H. T. 1862.  
*Common Pleas.*

HARE  
v.  
COPLAND.

"drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any endorser thereof."

The instrument described in the summons and complaint comes expressly within the Act. The bank are not bound to inquire into the genuineness of the signature. Even though the manager knew that the handwriting was not that of the payee, he is not bound to make inquiry, as *non constat* but that the party who wrote the name had the authority of the other to do so. It is enough for the instrument to *purport* to bear the endorsement of the payee. The meaning of that is, that when the document is produced at the trial, it shall appear to bear the name of the proper party: 1 *Taylor on Evidence*, p. 10, *et seq.*

*Jellett and Heron*, contra.

It does not appear, from the description of the instrument in the summons and complaint, that this was an instrument payable to order on demand. There is no express averment to that effect; nor can any such intendment be made. Again, the averments of the summons and complaint, which are admitted by this demurrer, are inconsistent with the inference that the instrument purported to be endorsed by Stewart & Kincaid. If the Bank had reason to know that the endorsement was not the genuine signature of that firm, it could not be said that it purported to bear that endorsement; that is to say, that it appeared to them to bear it. At all events, the section in question will not protect a banker from the consequences of gross negligence; and this is an action, at the suit of a customer, for gross negligence, in paying this cheque upon an endorsement which the bank ought to have known not to have been genuine. The purporting is a question of fact for the jury.

They cited *Perry v. Skinner* (a); *Planche v. Braham* (b); *Coles*

(a) 2 M. & W. 471.

(b) 4 Bing. N. C. 17.

*v. Bank of England* (a); *Davis v. Bank of England* (b); *British Linen Company v. Caledonian Insurance Company* (c); *Grant on Banking*, p. 28.

H. T. 1862.  
Common Pleas.  
HARE  
v.  
COPLAND.

*Macdonogh*, in reply.

The terms of the statute are explicit. The subject of inquiry is the state of the cheque, and not the state of the mind of the clerk who pays it. It is enough if it bear the name of the right party, no matter who wrote it: *Hinton v. Dibbin* (d); *Owen v. Byrne* (e); *Young v. Graves* (f).

*Cur. ad. vult.*

CHRISTIAN, J.

The question which is presented by the demurrer which has been taken to the plaint in this case is, whether the facts stated in it are sufficient to establish that the defendants are entitled to the benefit of the enactment contained in the 19th section of the statute 16 & 17 *Vic.*, c. 59? By that section it is enacted—[reads section].

E. T. 1862.  
May. 6.

The plaintiff is a customer of the defendant's bank, and he claims from them certain sums of money which he insists are, or ought to be, standing to the credit of his account. The bank resists this claim, asserting that they have already paid away the money on a draft of the plaintiff; and that, although what professed to be the endorsement of that draft, to the party whom they paid, was in fact a forgery, they are protected by this statute.

Such being the controversy, one would have expected very simple pleading upon both sides. A plaintiff relying upon the undoubted rule of the Common Law, and which is still unquestionably the *general rule* of law applicable to banker's drafts, namely, that payment on a forgery is no payment at all, and that the money is still in the banker's hands, would naturally declare in the common form for money had and received to his use, or on an account stated.

In answer to that, the defendant, admitting the general rule, but

(a) 10 Ad. & El. 442.

(b) 2 Bing. 393.

(c) 7 Jur., N. S., 587.

(d) 2 Q. B., N. S., 642.

(e) 2 Cr. & M. 353.

(f) 4 Bing. 258.

E. T. 1862. insisting on a statutable exception on favor of a particular class of drafts, would plead the facts which are necessary to bring his case within this statutable exception.

*Common Pleas*

HARE

v.

COPLAND.

Instead however of these simple and obvious forms, each party has resorted to a novel, and I think I may call it experimental, method of pleading. The plaint is extremely peculiar.—[His Lordship read it.]—It will be observed that it is not directly averred either that the £190. 17s. 7d. was payable to Stewart and Kincaid, or their order, *on demand*, or that the draft when presented for payment, *purported* to be endorsed by Stewart and Kincaid. If these two facts can be collected from the plaint, it is by inference from what is stated, and not by direct averment.

To this plaint the defendant, instead of, as he might have done, pleading the statute, has demurred.

Upon the record thus constituted, it is obvious that although, in form, the case is before us upon a demurrer by the defendant to the plaint, in substance and in its legal bearing it presents itself altogether in the light of a demurrer by the plaintiff to the sufficiency of the facts stated by himself, to found the special defence which the defendant seeks to raise upon them. To a right apprehension of the question we have to consider, it is necessary to look at the case, as it would be looked at, if the turn which the pleadings had taken had been this—a plaint for money had and received, a defence pleading specially the same facts which now appear on the plaint, and a demurrer by the plaintiff to that defence.

What is it, then, which a defendant, seeking to bring his case within this statutable-privileged class of drafts, must aver in pleading, and prove in evidence, and which, consequently, the defendant here must show to be sufficiently stated for him on the plaint which he has adopted as the statement of his case? These three things—viz., first, that a draft or order was drawn on him, being a banker, for the money *payable to order, on demand*; secondly, that when presented for payment it *purported* to be endorsed by the person to whom the same was drawn payable; thirdly, that thereupon he paid it to the bearer. When he shows these three things, then, and not until then, will he be entitled

to the benefit of the statute : the draft will be a sufficient authority, though it turn out to be forged, and "it shall not be incumbent on him to prove that the endorsement was made by, or under the authority of, the person to whom the draft was made payable." E. T. 1862.  
*Common Pleas*  
HARE  
v.  
GOPLAND.

The plaintiff insists that neither of the two first of these requirements can be gathered from this plaint. It is not apparent upon it (he says) either that the draft was payable to order, *on demand*, or that, when presented for payment, it *purported* to be endorsed by the payees.

In support of the first of these objections, the plaintiff's Counsel cited the case of *British Linen Company v. Caledonian Insurance Company (a)*. It must be admitted that this case is, at best, but a very unsatisfactory authority on the point, inasmuch as it does not appear, at all, from the report, on what ground it was that the House held that it was not within the statute. It is not easy to discover one, unless it be, that which the plaintiff's Counsel suggested—namely, that the letter of credit there was not, *in terms*, made payable on demand; unless the words "on advice" make any difference. If those words make no difference (and it was not contended in argument before us that they do), this case would seem to decide that a draft, payable to A B, or order, is not within the statute, unless it goes on in terms to say "on demand." I confess, but for that case, I should have been of opinion that a draft or a letter of credit, for money payable to A B, or order, without more, being in legal effect payable to the order on demand, was therefore within the statute. But supposing that to be so, and that the case in the House of Lords is not an authority to the contrary, still the plaintiff's first objection is by no means removed. If the plaint had professed to set out the draft in its terms, and it appeared to be worded "pay Stewart & Kincaid, or order," without more, we then, having the whole instrument before us, could pronounce what is its legal effect; and might, perhaps, notwithstanding that case in the House of Lords, hold it to be, in legal effect, payable to order, on demand. But the plaint does not profess to state it in its terms, but to give only

(a) 7 Jur., N. S., 587; S. C., 4 Law Times, N. S., 162.

E. T. 1862.  
*Common Pleas*

HARE  
 v.

COPLAND.

its legal effect; and, giving its legal effect, it states it simply to be, to pay "Stewart & Kincaid, or their order." But a draft may be, in legal effect, a draft to pay Stewart & Kincaid, or their order, without being a draft payable on demand—*e. g.*, a draft worded thus, "pay Stewart & Kincaid, or their order, ten days after sight;" that is, in legal effect, a draft payable to Stewart & Kincaid, or their order, and is not the less so because the payment is postponed. What was necessary for the defendant's purpose was, that the plaint should either have professed to set out the draft in *hæc verba* (in which case we could ourselves put on it the legal effect), or, if it gave only the legal effect, that it should give it to the full extent necessary to bring the case within the statute. As the plaint stands, there is nothing whatever legally pleaded on which the Court can judicially determine to which of the two species of drafts payable to order—namely, drafts payable to order *on demand*, or drafts payable to order *some time after demand*—this particular draft belongs; and it is essential to the plaintiff's case to show it to belong to the former. It may be said that this is matter of special demurrer only; but I am of opinion that it is matter of substance, inasmuch as what it shows is, that there is wholly wanting here anything to enable the Court to say whether or not the draft is, in one all-essential particular, conformable to the statute. It is scarcely necessary to add, that the averment "and thereupon it became the duty of said Royal Bank to pay said cheque when presented," does not help the case, as that is an averment of a mere inference of law, and not of a fact. I think the defendant was driven to supply this defect, by a pleading of his own; and upon that ground, if there was no more, I should be disposed to hold that his demurrer should fail.

The other point, in which the plaintiff insists that the defendant fails in extracting from the plaint the materials necessary for his defence, raises a question of much more importance. There is, he says, no averment, nor anything equivalent to an averment, of that which is of the very essence of this statutable defence, namely, that when the draft was presented for payment, it *purported* to be

endorsed by the Messrs. Stewart & Kincaid. The defendant, however insists, that the necessary result of the facts stated is, that it *did* so "purport." Before we can be in a position to determine that, we must first define the proper interpretation of these words "purport to be endorsed," as they occur in this statute. If they are merely synonymous with "have written upon the back," then undoubtedly the point is made out for the defendant, because it does appear on the plaint that, when the draft was presented, the names of Stewart & Kincaid were on the back of it. But I am of opinion that it is impossible to restrict them to that barren and literal signification. Suppose the cashier of a bank, looking across the counter, sees a notorious pickpocket follow a gentleman and pick his pocket of a draft; sees him bring that draft straight to the counter, and write on the back of it with his own hand the name of the man he has just robbed, and then present it for payment, no one will contend that if that cashier pays upon that endorsement, the transaction is protected by the statute; and yet it plainly would be so if the literal construction were adopted. Indeed it was, I think, admitted by the defendant's Counsel (and admitted or not, I have no doubt whatever that it is so), that whenever the bankers, or what is the same thing, their officers, know the endorsement to be a forgery, the transaction is unprotected. But how is it that the language of the statute can be made to bend to that reasonable result? By one process, and by one only, namely, by putting upon the word "purport" when it is used in this statute, one of the significations which the dictionaries show it to be capable of, namely, "import" or "signify." Thus interpreted, it involves not merely the naked fact of the name on the back, but the significancy of that fact to the mind of the banker; it raises at once the consideration of his *bona fides* and knowledge, and excludes cases of known forgery. In *Perry v. Skinner* (a), Parke, B., says:—"The rule by which we are to be guided in construing Acts of Parliament is, to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which

E. T. 1862.  
*Common Pleas*  
 HARE  
 v.  
 COPLAND.

(a) 2 M. & W. 476.



E. T. 1862.  
Common Pleas

HARE  
v.

COPLAND.

"it certainly could not have been the intention of the Legislature "should be done." But in this case it is not necessary to vary or modify the words, but simply to adopt one of their ordinary significations, in order to avoid the absurdity and manifest injustice of holding bankers discharged by a payment made on an endorsement known by them to be forged. But if that be so, what is the consequence? Why that we are brought at once to this result, that the question of "purporting" is a question for a jury. Once you are driven to concede, that the mere physical appearance of the name on the back is not conclusive, but that the operation of that fact on the mind and belief of the banker must be admitted as an element, you cannot stop short of conceding that the whole question of "purporting" is one of fact and of evidence for a jury; a question of evidence, *with a heavy burden of proof upon the plaintiff*. *Prima facie* the mere appearance of the name on the back of the draft, when it was presented for payment, makes the case for the defendants; and they are relieved from any obligation of proving that it was put there by, or by the directions of, the payee. If there be nothing more in the case, the Judge will direct a verdict for the defendants. If the plaintiff offer evidence to rebut that *prima facie* case, the Judge will, in the first instance (as it is the Judge's duty in every case to do) weigh that evidence, and if he thinks it insufficient to raise a reasonable doubt as to the *bona fides* of the banker, he will withhold it from the jury, and direct them as before. But if the evidence be such as to raise a substantial question of *mala fides* in the banker, *i. e.*, a substantial question, whether the name on the back of the draft did communicate to his mind at all any impression that it was the endorsement of the payee, the Judge is, in my opinion, clearly bound to leave the whole case to the jury, explaining to them the construction of the statute; and it is they, and they only, who can determine this question of "purporting."

These are in my opinion the principles on which this statute should be administered; and it now only remains to apply them to the case we have to consider. The plaint does not refer to the statute; nor does it use the language of the statute: it does

not aver that the draft purported to be endorsed. Can we affirm that, upon the facts which *are* stated, it conclusively appears that when the draft was presented by Lynch it did purport to the bankers to be endorsed by Stewart & Kincaid, and that there are no materials on which a jury might reasonably come to a different conclusion? What were the facts? First; when Lynch presented the draft for payment, it had on the back what professed to be the *signature* of Stewart & Kincaid—not, mark, the *endorsement* of Stewart & Kincaid by procuration of Lynch, or of anybody, but by their own *hands*. Secondly; it was manifest, to anybody who knew the handwritings of Stewart & Kincaid and of Lynch, that that signature was *not* in the handwriting of Stewart & Kincaid, and *was* in the handwriting of Lynch. Thirdly; the handwritings of all those persons were well known to the servants and agents of the bank at their office when Lynch presented the draft. The result of these three facts is, that the bank, or which is the same thing, their servants and agents, knew, when the draft was presented, that the endorsement was *not* what it assumed to be—what Lynch presented it *as being*, namely, the *signature* of Stewart and Kincaid. Add, fourthly, the fact admitted by the demurrer, that in paying the amount to Lynch, the bank, their servants and agents, were guilty of *gross negligence*. Now, if the meaning of the word “purport” be that which I have put upon it, is there no case on those facts which ought to be submitted to a jury? I will try that, by this simple test:—suppose the pleadings here had been in the simple form I mentioned at the outset, a plaint for money had and received, a plea of the statute, and an issue whether the draft did purport to be endorsed by Stewart & Kincaid, and that, on the trial of that issue, the plaintiff gave in evidence those facts which are stated on this plaint, as to knowledge of handwritings, and manifest appearance of handwritings, from which the inference is irresistible, or from which at all events a jury might most reasonably draw the inference, that the servants or agents of the bank well knew that Lynch was presenting the endorsement as, that which it was not, the personal *signature* of Stewart & Kincaid. Suppose, in addition to that, the plaintiff gave in evidence, say a letter from the governor

E. T. 1862.  
Common Pleas.

HARE  
v.  
COPLAND.

E. T. 1862.  
*Common Pleas.*

HARE  
v.

COPLAND.

of the bank to the cashier who paid the draft, or to anyone, stating that gross negligence had been committed in paying it under the circumstances, you would then have in evidence exactly the facts you have admitted here by the demurrer. Now, I ask could the Judge withhold that evidence from the jury, and direct them to find a verdict for the defendant? Surely these facts would raise a question for the jury. There is one point, which is left open upon the plaint, and which, as found by the jury either way, would be decisive; did the bank know that Lynch had no authority from Stewart & Kincaid to put their signature on the draft? If the plaintiff could prove that, in addition to the other facts, the case of forgery, known by the bank to be such, would be complete. Well, is there no evidence to go to the jury of that? Is not the very fact of the bank admitting themselves guilty of gross negligence in paying the money strong evidence of that; for how could they be guilty of negligence if they thought Lynch had authority? The burden of proof would be on the plaintiff to prove the absence of authority; but the very fact of that question being an open one, on which a jury might find either way, and on which the plaintiff has evidence to go to a jury, is alone decisive against the possibility of deciding the case save through the intervention of a jury. In the case which I have put, I am clearly of opinion that the Judge would not be warranted in directing a verdict for the defendants, but would be bound to leave to the jury the question whether this draft, when presented by Lynch, did "purport" to be endorsed by Stewart & Kincaid, explaining to them the meaning of the word "purport," in the sense which in my opinion it bears in this statute; and if the Judge in that case would not be warranted in directing the jury, it follows that neither can we on this record, with merely the same facts, affirm without a jury that it did so purport. It was strongly pressed by the defendant's Counsel that the silence of the plaint as to knowledge by the bank or its officers of Lynch's want of authority to endorse for Stewart & Kincaid was conclusive that the case was within the statute. I do not think so at all. It is true that an averment that they had such knowledge

would, coupled with the other averments, be quite conclusive that the case was *not* within the statute. But it by no means follows, from its absence, that it *was*, when we have the presence of other facts, which clearly show that the existence or non-existence of that knowledge was a jury question. The real question is, which of these two parties is prejudiced, in the present argument, by the want of any averment, either way, upon this point in the plaint? Decidedly the defendants, if the meaning of "purporting" be what I think it is. It is they who must extract from the plaint all the facts which are necessary to found this special statutable defence of theirs. The peculiarity of this demurrer is, as I pointed out before, that what it asserts is, not the insufficiency of the plaint to state the plaintiff's case, but its sufficiency to state the defendant's special defence; but, for that purpose, it affords them one fact alone, namely, that when the draft was presented, Stewart & Kincaid's names were on the back of it. If that alone be sufficient, irrespectively of all circumstances of *mala fides* on the part of the banker, if "purport" be synonymous with "pretend," there is an end to the question; but if it be not, how is it possible to deny that the other facts which, on this plaint, accompany that one fact, raise a question which a jury alone can solve? Did those names on the back, now admitted to have been forged, convey to the bankers or their servants the import of being genuine? I can quite understand it being held (although I could not assent to it) that "purport to be endorsed" means simply "have written upon the back;" and that consequently when once that appears, evidence, even the most direct, of knowledge of the forgery, is irrelevant and inadmissible. No one, as yet at least, has ventured to assert that; but, unless the question be posed there, I confess that I cannot see how it can reasonably be denied that the facts stated in this plaint raise a question for a jury, which must be answered before the statute has any *locus operandi*. To say, as was said, that this is refusing all effect to the statute—that it in fact repeals it—is a mere unreasoning assertion. Ample effect is given to the statute when it protects the banker from everything except connivance at known forgery. The real struggle here, and the purpose for which this demurrer has been taken, is to

E. T. 1862.  
*Common Pleas.*  
 HARE  
 v.  
 COPLAND.

E. T. 1862.  
*Common Pleas.*

HARE  
v.

COPLAND.

procure, if possible, the decision of this Court that even that question must be withdrawn from a jury; and that the one only question which a Judge at Nisi Prius can allow to go to a jury under this statute is, whether, when the cheque was presented, it bore upon the back of it the name of the payee?

For these reasons, I am of opinion that the defendants should be put to plead the statute, if they have a case for it, and that this demurrer should be overruled.

Before concluding, I ought, perhaps, to notice a case which the other Members of the Court, or at least some of them, consider to be an authority; but which I am of opinion, irrespectively of the question of its relevancy, is not before the Court in a shape in which it ought to be admitted as such. At the close of the argument last Term, a young gentleman of the Bar, not concerned in the case, produced a slip of paper, cut out of a number of the *Times* newspaper, which contained a report of a ruling at Nisi Prius, by Baron Martin, in a case of *Cookson v. Bank of England*. Inquiry was directed to be made as to that case, and the result has been that the Court has been supplied by the solicitors for the defendants here with a manuscript, obtained by them from a solicitor in London, which purports to be a shorthand writer's note of what passed at the trial of that case of *Cookson v. Bank of England*, at the Guildhall, on 29th June 1860. It is not alleged that this report was ever seen by the Judge whose ruling it professes to represent, or that it is the work of any recognised reporters of the Court, or of any professional reporters at all. It contains ample internal evidence of the contrary; being not only obscure as to facts, but full of the most absurd mistakes and blunders in what is attributed to the Counsel and the Judge. I confess I cannot help thinking that it is to be regretted that, in one of our Superior Courts, sitting *in Banco*, and giving judgment on a demurrer after a *Curia advisari vult*, a thing like this should be considered worthy of being mentioned as influencing the decision of the Court. My learned Brothers however think otherwise, and I have therefore felt bound to consider its relevancy. The facts, as well as I have been able to gather them, may be thus

abstracted:—Cheque, by Francis & Co., on Bank of England, E. T. 1862.  
in favor of Jackson & Co.; endorsement in these terms: "Per *Common Pleas*  
procuration, Jackson & Co.; A. Holmes, agent:"—presented HARE  
at bank, by some one, and paid in the ordinary course of business. v.  
COPLAND.

There was no suggestion, nor one fact on which to found a suggestion, of any *mala fides* or negligence in the bank or its officers. There was nothing known to them which could show or raise a suspicion that the endorsement was not really, what it assumed to be, the genuine endorsement of Jackson & Co., *per procuration* of A. Holmes. There was there no question for the jury, nor was it contended that there was. The only point made was a point of law—viz., whether an endorsement *by procuration* was within the meaning of the statute at all. The learned Judge ruled that it was, and directed a verdict for the defendants accordingly. But what alone gives rise to any question in the present case is, that this draft was presented as being what the defendants knew it was not, the endorsement of Stewart & Kincaid in person, and that the defendants were admittedly guilty of gross negligence in paying it. Really, after having stooped so low for an authority, we are but ill rewarded for our humility. The one point which I can discern, in which the two cases are in contact, is, that they both arose upon the same Act of Parliament.

KROGH, J.

My Brother CHRISTIAN has accurately stated the questions before the Court, and it will not be necessary for me to repeat them. This is a case which, though the amount immediately involved is small, is one of the greatest importance in relation to the banking and commercial interests of the land. At first sight, it occurred to us, that this section was introduced into the Act of Parliament, and was passed through the Legislature, without special notice, for it appears in an Act which received the royal assent on the 4th of August 1853, and which otherwise deals exclusively with the question of stamp duties. In this Act we find, towards the conclusion of it, section 19, which has been already

E. T. 1862.  
*Common Pleas*

HARE  
v.

COPLAND.

read. No one can doubt the sufficiency of the reasons for making this change in the law. We know that up to this time, drafts on bankers were always made payable to bearer. The Legislature must be supposed to have looked at the actual state of things. They proposed to make a difference in the form of cheques theretofore used, by making them payable to order. This would necessarily impose on bankers a deal of additional responsibility, inasmuch as it would render a banker's cheque made payable to order, and which the Act subjected to a penny stamp, such an instrument as would, before the passing of the Act, if made payable to order, have entitled the holder to recover the amount on foot of the bill. It is plain that the Legislature had in contemplation the probability of a vast increase in this department of banking business, and they accordingly made this provision to guard bankers against the liability which they would incur by reason of payment to the wrong person, on foot of a cheque made payable to a particular person or his order, and not to bearer, as theretofore. In such cases the banker would have to look not merely at the name of his customer, which he would know, but at the endorsements of other parties, resident in England or abroad, with whose handwriting there is no reason to presume that he would be acquainted; and yet he would have been made liable in case he paid it away to a wrong party. That is a common-sense view of the matter, and must have suggested itself to men of ordinary understanding, as a reason why the Legislature, while creating this new form of bankers' drafts, should thus have interposed to give them a protection, without which their business would have been paralysed. Let us look at the words of the section.—[His Lordship read it.]—That appears to me to be a provision perfectly clear and adapted to the ordinary sense of mankind. The words "if it should purport to be endorsed by the person to whom the same shall be drawn payable," restrict the question to the consideration, how the liability of bankers stood with respect to the old form of cheques payable to bearer, before the passing of the Act. But the Act does not stop there, but proceeds to define the protection to be thrown around bankers:—"It shall not be incumbent on such banker to prove that such endorsement

"or any subsequent endorsement was made by or under the direction or authority of the person to whom the said draft or order was made payable, either by the drawer or indorsee thereof."

E. T. 1862.  
*Common Pleas*

HARE  
v.

COPLAND.

Now if the words in this section have any definite operation, I cannot conceive how it can be doubted but that the intention of the Legislature was to make bankers pay these drafts to the order of the person named therein, but with similar liability as in the case of cheques payable to bearer; and that intention is not expressed merely by the first clause of the section to which I have referred, but, for greater security, the second clause of the same section does the same thing in different terms. My Brother CHRISTIAN has referred to the pleadings in this case, as creating a difficulty, supposing that the statute applied. It is said that it is not shown by the defendants that their case comes within the terms of the Act. Let us see whether the pleadings do not contain every ingredient required by the Act. What is the first?—"Any draft or order drawn upon a banker, payable to order on demand." Now it is admitted that this *was* a draft *drawn upon a banker*. It is described in the summons and plaint as "a cheque directed to the Royal Bank of Ireland, and requiring them to pay £190. 17s. 7d. to Messrs. Stewart & Kincaid, or their order." No ingredient is apparently wanted here, unless the words "*payable on demand*." Now what is a cheque drawn upon a banker by his customer but a draft for money payable at sight at a bank? The pleadings aver that it was the duty of the Royal Bank to pay this cheque when presented. I do not know what more than this is required to satisfy any man, of ordinary understanding, that this was a draft payable by a banker on demand. This appears to me therefore, so far to bring the case within the Act. The next requisite is, that it should "purport to be endorsed by the person to whom same shall be drawn payable." The cheque is stated to have been payable to Stewart & Kincaid. It appears by the pleadings that Patrick Lynch forged their endorsement on the back of the cheque. Now, if "purporting to be endorsed" mean that it should be *actually* endorsed, then *cadit questio*. In such case undoubtedly, there is no averment of any such fact. But if "purport" mean that it should *appear* to be the signature



E. T. 1862.  
Common Pleas

HARE  
v.

COPLAND.

of the party, whether that signature were fraudulently obtained or forged, still if it be capable of being read as the signature of the person in whose favor the cheque is drawn, the protection afforded by the Act accrues to the banker, who is bound to pay the amount across his counter. It is said that this may be true, but that there is an allegation in the plaint here which takes this case out of the Act; namely that the bank *knew* the signature of Steward & Kincaid, and also that of Peter Lynch. That is most probably the very case for which the Act was intended to provide, and instead of the averment taking this case out of the Act, it expressly brings it within it. No doubt the Royal Bank is well acquainted with the handwriting of the partners in that house, and of their accountants; but is that any reason why, when they saw this draft brought in by that individual, they should have declined to pay it? It is said that they have been guilty of gross negligence; and this averment must be taken as admitted by the demurrer. But there is no allegation that they knew that the cheque was a forgery? I do not now stop to inquire what might be the consequence if a banker knew that he was paying a forged cheque. Possibly he might, in that case, become accessory to a forgery, and amenable to the Criminal Law of the country. I prefer to confine my attention to the case before me, which is that of a cheque on a banker payable on demand, and having an endorsement purporting to be that of the person to whom it is made payable; and I hold that such a case comes within the protection of the Act. Then what is alleged against that? I agree with my Brother CHRISTIAN as to the growing evil of a multiplicity of reports. It may be, that some modern Omar might, by reducing the number of our reports, confer a benefit on posterity; but in the meantime it is our duty to consider any decisions which bear upon the construction of the Act. We have been referred to *The British Linen Company v. The Caledonian Insurance Company* (a). But that was not the case of a draft for the payment of money on demand, within the 19th section of the Act. That was an instrument of a character well known to merchants, namely, a letter of credit in favor of Andrew King, advising the banking company

(a) 7 Jur., N. S., 1174.

to honor his drafts on advice. That does not come within this section of the Act. It is certainly mentioned in the schedule of the Act, but that is merely for revenue purposes.—[His Lordship read the clause of the schedule.]

E. T. 1862.  
Common Pleas  
HARE  
v.  
COPLAND.

A letter of credit differs essentially from a cheque, in two respects; first, it only authorises the drawing of a draft upon the bank; and, secondly, it is honored only on advice. The Lord Chancellor thus unequivocally states his opinion:—"There is an enactment, the 16 & 17 Vic., c. 59, which has been referred to in the argument, as discharging bankers from liability upon a cheque payable to bearer, where there is no forgery; but there has been no enactment to save their liability in such a case as this, where the bank has paid upon the forged signature of Andrew King. That is no payment at all. Therefore things are in the same state as if the money were still in the till of the bankers." There, Andrew King drew nothing at all; but the man, into whose hands the letter of credit came, took it and wrote Andrew King's name on the back of the letter of credit, and got the money from the bank. But the terms of that were, that the bank should pay the draft of Andrew King "*on advice*." Are these latter words to be struck out of the instrument, as of no effect,—words so well known and recognised in all banking and commercial transactions all over the world, which enable the British merchant to carry on transactions to the extent of millions? Yet we are told that such was equivalent to an ordinary cheque, payable to order on demand! It is, on the contrary, an instrument similar to those letters of credit which persons travelling on the Continent take with them, in order to enable them to draw on houses, say in Amsterdam, Venice, Constantinople, &c. Now, what are these for, unless to intimate that so much money stood to the credit of the account of the party in whose favor the letter was drawn? I hold that case as a distinct authority, on the part of the House of Lords, in favor of the view taken by the majority of this Court. I accordingly consider this case to come within both branches of the 19th section, it being sufficiently shown to have been a draft payable to order on demand, and which purported to have been endorsed by the person to

E. T. 1862.  
Common Pleas

HARE  
v.

COPLAND.

whom it was made payable; and that there is nothing to prevent the point being decided upon a demurrer. My Brother CHRISTIAN has playfully adverted to the circumstances under which we postponed giving judgment, until we got a special report of the case of *Cookson v. The Bank of England*; but I was not aware that our action was paralysed by the production of the newspaper report of that case. I was prepared to give judgment in this case on the last day of the last Term. Mr. Ball, in his recent, may I not say great, argument, in the Yelverton case (and certainly a more splendid argument it was never my good fortune to hear in a Court of Justice), cited a passage from the judgment of Lord Brougham, where he expresses disapproval of *Nisi Prius* decisions, when not maturely considered. So say I. But are we to say that the reading of this Act, pronounced by Baron Martin, of whom, as our fellow-countryman, we may justly feel proud, ought to be treated with contempt? Are we to notice every report of a case which appears in print, and are we, at the same time, to refuse to notice a report which comes out of the office of the best known professional men in England, the Messrs. Freshfield, solicitors to the Bank of England, because it happens to be in manuscript? It strikes me that that case is perfectly intelligible. The cheque was endorsed by a clerk who had absconded. This was clearly a case coming within the Act of Parliament, and it was so held. Here it has been said that the Royal Bank knew that the cheque was not endorsed in the handwriting of Stewart & Kincaid, and that they were acquainted with the handwriting of Peter Lynch. Is there anything more in that case? Jackson & Co. did not there even purport to be the endorsers, except by their name being signed, by procuration, by a Mr. Holmes, their agent. The jury in that case, having been *pro forma* sworn, Baron Martin is reported to have told them, in his charge, that the section of the Act of Parliament protected the bank from paying the cheque, if the person who drew on the bank had no authority; but I think that the actual words which fell from his lips must have been, that the bank were entitled to this protection, even though the person who

wrote his name on the back of the cheque had no authority to do so. There the plaintiff was nonsuited; and I cannot see why the same question cannot be fairly raised on demurrer. We have no right, on this argument, to inquire further into the pleadings than to see whether the defendants have brought their case within the protection which the statute designed to afford, and which, in my opinion, they have done.

E. T. 1862.  
*Common Pleas*  
 HARE  
 v.  
 COPLAND.

Upon these grounds, I am of opinion that this demurrer must be allowed.

BALL, J.

I concur in the judgment of my Brother KEOGH, and in the reasons he has expressed.

MONAHAN, C. J.

Concurring, as I do, in the opinion expressed by the majority of the Court, it would perhaps be sufficient for me to say so; but as, in consequence of a difference of opinion existing on the Bench on the subject, I have considered the case with all the attention in my power, I think it right shortly to state the reasons which occurred to me, in support of the judgment we are about to pronounce. As some observations have been made on the form of the pleadings, and the manner in which the question comes before us, it is right to state exactly what the summons and plaint alleges: it states that the defendants are bankers, and that plaintiff lodged with them, as such, a considerable sum, payable to his order; and that, on the 12th of July, he drew on them a cheque, directed to the defendants, requiring them to pay to Messrs. Stewart & Kincaid, or to their order, £190. 17s. 7d.; that the defendants had ample funds of plaintiff to pay said cheque; and thereupon it became their duty to pay said cheque, when presented, only to Messrs. Stewart and Kincaid, or their order; that Peter Lynch forged the signature of Messrs. Stewart & Kincaid as an endorsement on the back of said cheque, and presented same for payment to the defendants; that said endorsement is manifestly not in the handwriting of Stewart and Kincaid, or either of them, and is manifestly in the handwriting of the said Peter Lynch; and the handwritings of Stewart and

E. T. 1862.  
*Common Pleas.*

HARE  
v.

COPLAND.

Kincaid and the said Lynch were well known to the servants and agents of the said defendants at the bank when the cheque was presented for payment, yet the defendants wrongfully paid the amount of said cheque out of plaintiff's money; and same was so paid by the gross negligence of the defendants and their servants; and Lynch has absconded, and the money has been lost, and the defendants have refused to pay same to the plaintiff. To this count the defendants have demurred, alleging that plaintiff has himself shown that the defendants were justified in paying the cheque in question to the person presenting it, as same had an endorsement purporting to be that of Stewart & Kincaid; and that defendants are not liable for the amount, in consequence of the provisions of the 16 & 17 Vic., c. 59, s. 19, by which it is enacted—[His Lordship read the section of the Act. See p. 427].—It has been objected that this question should not have been raised by demurrer to the summons and plaint, and that the proper mode of raising the question would have been by the plaintiff bringing an action on the common money counts; to which the defendants should have pleaded the payment of the cheque in question, and that same purported to be endorsed by Stewart & Kincaid; and that, on the trial of the issue to be raised on such plea, the question for the jury would be, did the cheque in fact purport to be endorsed by Stewart & Kincaid? No doubt the question could have been so raised; and I believe in fact the summons and plaint contains the common money counts, to which such a defence as has been suggested has been pleaded; but, though this is so, I confess I, for one, see no objection that, in order to avoid the expense of a trial, and the subsequent motions incident thereto, the plaintiff and defendants should endeavour, by a correct statement of the facts, to have the case disposed of by a demurrer, such as the present, raising the question whether the facts stated do not show that the defendants are entitled to the advantage of the statute. It has been alleged that the statute applies only to drafts or orders payable to order on demand; and that it is not alleged that the present order was payable on demand. I entertain no doubt that the cheque in question was not in "words payable on demand;"

neither is so the common banker's cheque, which is used by all bankers: every such cheque is, "pay A B, or bearer;" but no one, I believe, ever doubted that such a cheque was payable to bearer when presented by him within bank hours, and in the same way when a cheque is payable to "A B, or order." I believe, until the doubt was suggested in the present case, that no one ever entertained a doubt that such a cheque was payable on demand to the person to whose order it was made payable, or to bearer, if endorsed by the person to whose order it was payable; and the summons and plaint so treats it. The complaint is, not that the defendants paid too soon a cheque presented for payment, but that they were guilty of negligence by paying a cheque bearing the forged endorsement of the persons to whose order it was payable: treating it all through as a cheque properly payable on demand. This therefore being a draft payable to order on demand, within the Act of Parliament, the only remaining question is, does the plaintiff himself state a case showing that the defendants are entitled to the benefit of the Act, as a defence against the complaint of improperly applying plaintiff's money in discharge of the order or cheque in question? The first consideration naturally is, what was the state of the law before the passing of the Act, and what was the mischief, real or supposed, intended to be remedied? Both before and since the passing of the Act, the banker was bound to know his customer's handwriting; and if he paid a draft or order, however well forged, he was liable, and still continues liable; but, in addition to this, if the customer made a cheque or order, though payable on demand, payable to the order of a third person—if the banker paid such a cheque, on a forged endorsement of such third person, he was liable to repay the money; but of course the bank was discharged from liability, by showing that the endorsement was made by, or by the direction of, the person to whose order it was made payable. This was considered a hardship on bankers; and accordingly it is enacted that if the cheque, when presented for payment, purports to be endorsed by the person to whose order it is made payable, it shall be a sufficient authority to the banker to pay the amount

E. T. 1862.  
*Common Pleas.*

HARE  
 v.  
 COPLAND.

E. T. 1862.  
*Common Pleas.*

HARE  
v.

COPLAND.

to the bearer thereof; and the banker shall not be bound to show that the endorsement was made by, or under the direction or authority of, the person to whose order same was payable. What is this but saying, in so many words, that the bankers shall be discharged, though the endorsement was forged? this being in fact the mischief intended to be legislated for, and the only case in which in fact the banker required any protection; as, if it was not a forgery, he was of course justified in paying the amount, without requiring the protection of the statute. What is plaintiff's allegation in his summons and plaint? That Peter Lynch forged the signature of Stewart & Kincaid as an endorsement on back of said cheque. May I ask what is the meaning of forging the signature of Stewart & Kincaid as an endorsement on the back of the cheque, but writing the name Stewart & Kincaid? And when that was so done, can anyone doubt that the cheque, when presented for payment in that state, purported to be endorsed by the Messrs. Stewart & Kincaid? Unless it did, how could their signature have been forged? I am not aware that the word "purport" has any definite legal meaning, as certain words of art have; but of this I have no doubt that, if a party forges the signature of the payee of a cheque, and presents it for payment, with such forged endorsement, he presents it purporting to be endorsed, within the mischief and meaning, and therefore within the construction, of the Act of Parliament in question; and I entertain no doubt that no such question suggested itself to the plaintiff; but that the question he intended to raise was, that, though the cheque in question purported to be endorsed by Stewart & Kincaid, still that, as the defendants and their clerks were acquainted with their handwriting, and also with the handwriting of Peter Lynch, and were guilty of what is called gross negligence in paying the cheque in question to the said Peter Lynch when same was presented by him; that therefore the defendants are not entitled to the benefit of the statute. If I am right that the cheque in the present case purported to be endorsed by Stewart & Kincaid, then it became payable to bearer on demand; and those cases relating to lost or stolen bank notes may be considered applicable. It

was formerly considered that, if a party who received a stolen bank note was guilty of any want of care or of negligence in the receipt of it, that he was not entitled to recover the amount, but that the property in it still remained vested in the then owners; but that doctrine, which is sought to be revived in the present case, has for many years been completely exploded. A leading case on the subject is *Raphael v. The Bank of England* (a). In that case, the plaintiffs were money changers resident in Paris, who, in the course of their business, changed for gold certain Bank of England notes, which had been stolen some time before they did so. They had got a printed notice of the number of the stolen notes; which notice they placed on a file. When asked to change the notes in question, they omitted to refer to the file, and took the notes, without recollecting that they had been included in the list of stolen notes. The jury found that the plaintiffs had acted *bonâ fide*, but that they were guilty of negligence in taking the notes without referring to the notice. After full consideration, the Court of Queen's Bench decided that the plaintiffs were entitled to recover the amount, having acted *bonâ fide*; and that negligence was immaterial, save as evidence of *mala fide*. The same principle was acted on in the case of *Goodman v. Harvey* (b). That was an action by the endorsee of a bill of exchange, of which the acceptor had been defrauded by the drawer; and the question was, whether the endorsee, who sued the acceptor, had acted *bonâ fide* in taking the bill? Lord Denman, in giving the judgment of the Court said:—"I believe we are all of opinion that "gross negligence only would not be a sufficient answer, when "the party has given consideration for the bill. Gross negligence "may be evidence of *mala fides*, but it is not the same thing." If the principle of these cases has any application to the case before us, the plaintiff should have alleged, not merely that the defendants were guilty of negligence, but that they were aware that the endorsement of Messrs. Stewart & Kincaid was a forgery. During the argument, defendant's Counsel mentioned a *Nisi Prius* case, before Baron Martin, which was reported in

E. T. 1862.  
*Common Pleas.*

HARE  
v.  
COPLAND.

(a) 17 C. B. 161.  
VOL. 13.

(b) 4 Ad. & Ellis, 870.  
57 L



E. T. 1862.  
*Common Pleas*

HARE  
v.

COPLAND.

the *Times* newspaper, and which was supposed to have some bearing on the question. Since the argument, defendant's Counsel has sent to me the shorthand writer's report of the case, which was obtained from the solicitors of the Bank of England, which were the defendant in the case. Though the report contains some verbal inaccuracies, I have not had the least difficulty in ascertaining the facts of the case, which were, that a cheque was drawn on the bank by a customer, in favor of Jackson and Company, or order. A person of the name of Holmes, who had been the agent of Jackson & Company, but ceased to be such before the transactions in question, endorsed the cheque, "Jackson & Co., per procuration, J. Holmes." It was admitted at the trial before Baron Martin, as a matter of fact, that Holmes had not authority to endorse; and the question was, whether the Act applied to such a case; it being contended by the plaintiff that the bank should have required to be satisfied of the authority of Holmes to endorse Jackson's name; and that the Act did not apply to a case in which the cheque did not purport to be endorsed by the person to whose order it was payable. Baron Martin however ruled differently, and nonsuited the plaintiff; which nonsuit was acquiesced in. I confess I see no objection to our taking this case from the shorthand writer's report, verified by the solicitors of the Bank of England, the defendants in the case; and I, for one, before I decide any case, am most anxious to consider any case that may possibly assist me. This case is of some value, as showing that even if the defendants knew, when they paid the cheque in question, that the name Stewart & Kincaid was in Peter Lynch's handwriting, still that was not sufficient; they should also know that he had not the authority of Stewart and Kincaid to endorse it in their name.

The case in the House of Lords, to which we have been referred, has no application to the question before us. In that case, a letter of credit was issued, directed to the agent of the British Linen Company, in the words—"Sir,—Please honor the drafts of Mr. Andrew King, on account of this Company—£436. 7s. 5d., on "advice." This was presented to the agent, with the name of

Andrew King forged on it, and paid. It was held by the House of Lords that this was not the case of a cheque payable to order, with a forged endorsement, but the case of a forged cheque; as the Company were, by the terms of the letter, only to honor the drafts of King. And though, in the schedule of the Act, such letters of credit are enumerated as drafts or orders, this is merely for fiscal purposes. I therefore cannot see what application that case has to the one before us.

On the whole therefore, I concur with my Brothers BALL and KNOGH, in holding that the plaintiff has shown that the cheque in question, when presented for payment, purported to be endorsed by Stewart & Kincaid; and that he has not shown any facts sufficient to deprive the defendants of the benefit of the Act in question.

Demurrer allowed, and judgment for defendant.

E. T. 1862.  
Common Pleas  
HARE  
v.  
COPLAND.

### CONNORS v. JUSTICE and Wife.

THIS was an action for oral slander against the defendant Thomas Holmes Justice and Margaret his wife.

The first count of the summons and plaint alleged, that the plaintiff always before and at the time of the speaking and publishing, by the defendant Margaret Justice, of the false and defamatory words thereafter mentioned, was and still is a chaste and virtuous single woman, earning her livelihood in the capacity and occupation of a domestic servant; and shortly before the aforesaid speaking and publishing was in the employment, as such domestic servant, of one Parsons Berry and Isabella Berry his wife, and

coming to hire with me after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge! No special damage was alleged.—*Held*, that the words were actionable *per se*, as relating to the plaintiff's employment.

May 7, 9, 12.

The summons and plaint in an action for oral slander alleged that the defendant spoke and published of the plaintiff, whose employment was that of a female domestic servant, the following words, in relation to her employment—"I was so incensed with that girl for

E. T. 1862.  
*Common Pleas*  
 CONNORS  
 v.  
 JUSTICE.

had always in such employment conducted herself as a chaste and virtuous domestic servant; that in the earning of her livelihood in the capacity and occupation of, &c., it was and is necessary and essential that plaintiff should be, and be reputed to be, a person of chaste and virtuous character and conduct, yet the defendant, well knowing the premises, but maliciously intending to injure the plaintiff in her said occupation and capacity of a domestic servant, falsely and maliciously spoke and published of and concerning the plaintiff, in relation to the plaintiff's said occupation and employment, and capacity of a domestic servant, the false, scandalous, malicious, and defamatory words following, that is to say:—"I (meaning the defendant Margaret Justice) was so incensed "with that girl (meaning the plaintiff), for coming to hire with "me (meaning to hire as such domestic servant as aforesaid, "with the defendant Margaret Justice), after having had a miscarriage at Mrs. Berry's house, and sent away by her in a "car (meaning that the plaintiff as such domestic servant in the "employment of the said Parsons Berry and his said wife as "aforesaid, had been debauched, and had been pregnant and "miscarried of the child with which plaintiff was so falsely "insinuated to have been pregnant, and had in consequence "thereof, been sent away by the said Isabella Berry from her "said house, and was not a fit person to be employed as such "domestic servant as aforesaid").

The second count, in addition to the foregoing words, charged the defendant Margaret Justice with having added:—"And she "(meaning the said Isabella Berry) afterwards to give the girl "(meaning the plaintiff) a good discharge (meaning that the "plaintiff had been guilty of such immoral conduct in her aforesaid "said capacity and occupation, as not to be deserving of a good "discharge as such domestic servant as aforesaid), it (meaning "the aforesaid false, scandalous, malicious, and defamatory matter) "is a fact."

The third and fourth count substituted "mishap" for "miscarriage," and otherwise corresponded with the first and second.

The fifth and sixth counts laid the words as "a mishap or mis-

carriage." The plaintiff claimed £100 for her damages, sustained as aforesaid. E. T. 1862.  
Common Pleas

CONNORS  
v.  
JUSTICE.

Demurrer.—That the said counts respectively disclosed no cause of action good in substance, because the words in said counts alleged to have been spoken are not actionable in themselves; and because said words do not impute any offence cognizable in any Temporal Court; and because it is not shown that the said words were spoken of the plaintiff in the character of a domestic servant, or how the said words had relation to her conduct in that capacity.

*Jellett*, in support of the demurrer.

Words imputing incontinence are not actionable *per se*: *Campbell v. White* (a). The slander alleged in the summons and plaint was not necessarily connected with the employment of the plaintiff as a domestic servant: *Lumley v. Allday* (b); *Ayre v. Craven* (c); *Galway v. Marshall* (d). It is not enough to allege the fact of the words having been spoken in this relation, unless they are *per se* capable of such a construction: *Wharton v. Brook* (e), *per Twisden, J.* Such allegations are mere conclusions of law.

*W. M. Johnson* and Serjeant *Armstrong*, contra.

If a particular quality be essential for carrying on a trade or employment, an impeachment of it is actionable. Chastity is an essential qualification of a domestic servant. Want of chastity, if discovered, would entitle an employer to discharge a female domestic immediately, without previous warning or month's wages. Therefore it follows that the imputation of such misconduct is actionable *per se*, as relating to the employment of the party slandered. All the authorities referred to upon the other side proceeded upon the ground that the words there were not necessarily connected with the employment of the parties complaining, so as to tend to deprive them of their means of living: *Hemmings v. Gasson* (f); *Starkie on Slander*, p. 117;

(a) 5 Ir. Com. Law Rep. 312.

(b) 1 Cr. & Jer. 305.

(c) 2 Ad. & El. 2.

(d) 9 Exch. 294.

(e) 1 Vent. 21.

(f) 27 Law Jour., N. S., Q. B., 232.

5/

E. T. 1862. *Cooke on Defamation*, pp. 16, 17; 2 *Lush's Saunders on Pleading*,  
*Common Pleas* 2nd ed., p. 904; *Terry v. Hooper* (a); *Browne v. Hyde* (b); *Rex v.*  
 CONNORS *Inhabitants of Brampton* (c); *Rex v. Inhabitants of Welford* (d);  
 v. 1 *Chitty's Pr. Law*, p. 76, n.; *Addison on Contracts*, 5th ed.,  
 JUSTICE. p. 387; *Atkin v. Acton* (e); *Rumney v. Webb* (f); *Watson v. Van-*  
*derlash* (g); *Gibs v. Price* (h); *Pridham v. Tucker* (i); *Southee*  
*v. Denny* (k); 1 *Rolle's Abridgment*, p. 50; *Flower's case* (l);  
 14 & 15 *Vic.*, c. 92, s. 16.

*Jellett*, in reply.

There is no legal distinction between incontinence in a man and a woman. The averments which have been introduced into the summons and plaint, with a view to withdraw the case from the decision of the Court, and submit it to a jury, must be disregarded: *Seymour v. Madden* (m); *Metcalf v. Featherston* (n); *Smith on the Law of Master and Servant*, p. 79.

*Cur. ad. vult.*

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MONAHAN, C. J.

May 12. This case comes before the Court on a demurrer to the summons and plaint. The plaintiff describes herself as a domestic servant, and says that, before and at the time of the speaking of the false and defamatory words she was a chaste and virtuous single woman, earning her livelihood in the capacity and occupation of a domestic servant, &c.; and that, in the earning of her livelihood in such capacity and occupation, it was, and is, necessary and essential that she should be, and be reputed to be, a person of chaste and virtuous character and conduct; and that the defendant, well knowing the premises, but intending to injure the plaintiff in her occupation and capacity of a domestic servant, falsely and mali-

(a) 1 Lev. 118.

(c) Cald. Set. Cas. 11.

(e) 4 Car. & P. 208.

(g) Het. Rep. 69.

(i) Yelv. 153.

(l) Cro. Car. 211.

(b) 2 Wils. 300.

(d) Cald. Set. Cas. 57.

(f) 1 Car. & M. 104.

(h) Styles 201.

(k) 1 Ex. Rep. 196.

(m) 16 Q. B. 326.

(n) 11 Exch. 269.

ciously spoke and published, of and concerning the plaintiff, in relation to her said occupation and capacity of a domestic servant, the defamatory words, &c., complained of; which are, in effect, that while the plaintiff was in Mrs. Berry's employment as domestic servant, she was debauched, and had a miscarriage, and, in consequence thereof, was dismissed by Mrs. Berry for such misconduct, and sent away by her in a car. To this the defendants have demurred; and they insist that no action can, in general, be maintained for words imputing want of chastity; and, in support of that doctrine, defendants' Counsel has referred to the well-known case in which it was held not be actionable to impute adultery to a clergyman; and no doubt such is the law. Whether originally right or wrong, it is now perfectly established, as a general rule, that the imputation of want of chastity, to either man or woman, is not actionable. And the defendant further insists that there is nothing in the case of the plaintiff, a domestic servant, to distinguish her case from that of any other woman; and that, from the very nature of the imputation, the matter charged is one that could not have been committed by the plaintiff in her capacity of maid-servant; and that the statements in the summons and plaint, in relation thereto, are not sufficient to distinguish the plaintiff's case from the ordinary one. And defendants, in this part of the case, rely on the case of *Lumley v. Allday* (a). In that case the plaintiff was clerk to a gas company; the defendant spoke to him these words:—"You are a fellow; a disgrace to the town; unfit to hold your situation, for your conduct with whores." Plaintiff alleged that the words were spoken of him in his business or office as clerk. This is certainly a strong case, the defendant having himself alleged that the plaintiff was unfit for his situation. The Court held the words not actionable. But to see how far it is an authority applicable to the present case, it is necessary to see on what grounds it was decided. Bayley, B., delivered the judgment of the Court; he said:—"Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity; or connects the imputation with the

E. T. 1862.

*Common Pleas*

CONNORS

v.

JUSTICE.

(a) 1 Cr. &amp; J. 301.

E. T. 1862.  
*Common Pleas*  
 CONNORS  
 v.  
 JUSTICE.

"plaintiff's office, trade, or business;" and he held that the charge proved was not actionable, because the imputation it contained did not imply the want of any of those qualities which a clerk ought to possess; and further, that the imputation had no reference to his conduct as clerk. The Court, in that case, were of opinion that want of chastity in a man, and frequenting the company of dissolute women, did not constitute any objection to him as clerk to a gas company. If the Court were right in their premises, they were right in their conclusion. If such an imputation did not unfit a man for his office, and would not properly prevent his being employed in a similar one, the words were not actionable; but, having regard to the facts stated in the present case, I think I shall be able to show that the case referred to does not rule the present. One other case, mainly relied on by the defendant's Counsel, is *Ayre v. Craven* (a). This was an action, brought by a physician, to recover damages for words alleged to have been spoken of him or his profession. The third count, which was the only one on which the plaintiff obtained a verdict, was to this effect, stating the words used to be; "Have you heard it has been discovered who are the parties in the crim. con. affair, so long talked of?" and on the person, spoken to, asking who was the party, the defendant replied "Doctor Ayre." Now, it will be observed that, in that case, there is nothing whatever connecting the imputation with the plaintiff's profession as doctor. It is not alleged that he took advantage of his position as medical attendant to debauch one of his patients, or anything to that effect; and I do not think that it can be doubted that any such imputation in a physician would be actionable; and I think it is clear that such was the opinion of Lord Denman, who delivered the judgment of the Court in that case: he says:—"In the present case, much doubt was entertained whether the words were not actionable, within the rules just adverted to, for being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation. The statement must be thought

(a) 2 Ad. & El. 2.

"large enough to admit such proof to be adduced at the trial; in  
"which case the necessary proof would be presumed to have been  
"given, and the judgment ought not to be arrested; but, after  
"full examination of the authorities, we think that, in actions of  
"this nature, the declaration ought not merely to state that such  
"scandalous conduct was imputable to the plaintiff in his pro-  
"fession, but also to set forth in what manner it was connected  
"by the speaker with that profession; for this defect we think  
"the judgment must be arrested." But now let me ask what  
bearing has this case on the case before us? The summons and  
plaint alleges that in plaintiff's earning her livelihood as a domestic  
servant, it was and is necessary and essential that she should be,  
and reputed to be, a person of chaste and virtuous character and  
conduct; and that the defendant knowing this, and intending to  
injure the plaintiff in her capacity of domestic servant, spoke the  
words complained of. Now if, to sustain the present summons  
and plaint, we are bound to consider this as a statement of a  
fact that chastity was an essential requisite in the description of  
situation which the plaintiff held as domestic servant, why are we  
not bound to consider that statement of fact admitted by the  
demurrer? Or, if we are to take it as the assertion, not of a  
matter of fact, but of a matter of law, can anyone doubt that  
chastity is an essential requisite in a female domestic servant?  
And can anyone doubt that the master or mistress of a family  
would be justified in dismissing, without the usual month's notice,  
a female domestic servant for unchaste conduct? In the present  
case, the slander is, that the plaintiff's mistress (Mrs. Berry)  
dismissed her, in consequence of her having discovered the unchaste  
conduct of the plaintiff. Coupling this with the allegation that  
chastity is a necessary qualification, can there be any doubt enter-  
tained that the imputation was one of misconduct rendering her unfit  
for her situation; and therefore not within the principle of the case  
of the gas company's clerk, for whose situation the Court did  
not consider the want of chastity any imputation of unfitness.

On the whole therefore we are of opinion that defendants'  
demurrer must be overruled.

E. T. 1862.

*Common Pleas.*

CONNORS

v.

JUSTICE.



T. T. 1862.  
*Common Pleas*

EYRE v. M'DOWELL, Official Manager of the Tipperary  
 Joint-stock Banking Company.

June 3, 4, 12.

To an action by endorsee against acceptor of a bill of exchange, the defendant pleaded thirdly, that before the obtaining or acceptance of said bill, the plaintiff agreed to sell an estate to J. S., the drawer of said bill, and that a portion of the purchase-money of said estate should be secured by a bill to be accepted by the T. Bank (whose official manager the defendant was), and the balance by a mortgage on part of the estate; that the plaintiff, at the expense of J. S., should do all necessary acts, and execute all proper transfer deeds, &c. That subsequently it was agreed between the plaintiff and J. S., that the amount for which the bill was to be drawn should be increased, so as to include a further sum alleged to be due by J. S. to the plaintiff; and accordingly, J. S. delivered to the plaintiff a bill of exchange drawn by him upon and accepted by the bank for £17,000, payable the 1st of December 1855, which the bank accepted for the accommodation of J. S., and never received any consideration for the acceptance or payment of the same; which bill was afterwards renewed by the bank, by the bill now sued on, for which they had never received any value or consideration, nor, except as aforesaid, there never was any value or consideration for the endorsement of said bill to the plaintiff; and that after the bill became due, and before the commencement of the suit, the plaintiff repudiated the said agreement, and refused to convey the estate and to perform the agreement.

THIS was an action by the plaintiff against the official manager of the Tipperary Joint-stock Bank, pursuant to the Joint-stock Companies Winding-up Acts 1848 and 1849, on a bill of exchange, dated the 26th of November 1855, drawn by John Sadleir for £17,000, payable six months after date, and endorsed to plaintiff. The plaintiff claimed £22,086. 0s. 7d., on foot of said bill.

The defendant pleaded thirdly, as to said last mentioned sum, and the interest thereon, that before the obtaining of said bill or acceptance thereof, on the 13th of May 1855, by a memorandum of

The fourth defence averred, in addition, that J. S., after making the said agreement, conveyed his interest in said estate to trustees; that the plaintiff afterwards filed a bill in the Court of Chancery in England against the present defendant, amongst others, as representing the bank, praying that the said agreement should be cancelled as fraudulent, &c.; that the defendant appeared on the part of the bank, and disclaimed any interest in the subject-matter of the suit; and that he was thereby induced, as such official manager, to change, and did change, the position of the banking company, whereby the plaintiff was estopped from setting up the validity of the agreement, or to recover the amount of said bill.

The plaintiff replied to the fourth defence, that the bill in Chancery was afterwards dismissed by Side-bar order. The plaintiff likewise demurred to both pleas, and the defendant demurred to the replication.

*Held*, that the third defence was no answer to the action, inasmuch as the making of the contract, and not its performance, was the consideration for the bill.

*Held also*, that the fourth plea was likewise no answer to the action, inasmuch as it did not follow that the defendant was necessarily induced by the plaintiff's suit in Equity to disclaim the benefit of the agreement, and thereby to alter his position.

*Held also*, that even assuming this to have been the case, the replication, by showing that the suit had been dismissed for want of prosecution, was a sufficient answer to the defence.

agreement made by and between the said John Sadleir of the one part, and the plaintiff of the other part, and under their hands and seals respectively, in consideration of the sum of £44,884. 0s. 4d., by the said John Sadleir paid or secured in manner thereafter mentioned, the plaintiff agreed to sell to the said John Sadleir all the said plaintiff's estate, right, title and interest, property, claim and demand whatsoever, on foot of principal, interest and costs, or otherwise, in certain portions of the estate commonly called or known as the Wall or Coolnamuck Estate, situate in the counties of Waterford and Tipperary, containing, &c., &c., and particularly described as lots, &c. &c.; the sum of £14,961. 6s. 9d., portion of the said purchase-money, to be secured to the said Thomas Joseph Eyre by the acceptance of the Tipperary Joint-stock Bank, payable on the 1st of December then next, with interest thereon at £5 per cent.; and the balance of said purchase-money, with interest thereon, to be secured to the said plaintiff by a mortgage of some of the lots, and otherwise in the manner in said memorandum mentioned; and further, that the plaintiff should, at the expense of the said John Sadleir, do all necessary acts, and execute all proper deeds and writings for the due transfer and conveyance to the said John Sadleir of the said several portions of the said Wall Estate, and of all deeds, policies of insurance, or other securities, and all the plaintiff's interest, claim and demand in or upon the same, &c.; and that all necessary deeds for carrying all or any of the provisions in the said memorandum of agreement into full effect, should be executed by the parties thereto as Counsel should advise; and at the cost of the said John Sadleir. That after the date of the said memorandum of agreement, it was agreed between the plaintiff and the said John Sadleir, that a sum of £2038. 13s. 2d., alleged to be then due from the said John Sadleir to the plaintiff, should be added to the said sum of £14,961. 6s. 9d., and therewith be secured by a bill of exchange, to be accepted by the said Tipperary Joint-stock Banking Company, for the sum of £17,000; and that said John Sadleir did, on faith of the agreement expressed to be contained in the said memorandum of the 12th of May 1855,

T. T. 1862.  
*Common Pleas*

EYRE  
v.

M'DOWELL.

T. T. 1862.  
*Common Pleas*

EYRE  
v.  
M'DOWELL.

deliver to the plaintiff a bill exchange drawn by the said John Sadleir upon, and accepted by, the said Tipperary Joint-stock Banking Company, for the sum of £17,000, payable the 1st of December 1855. That said bill was so accepted by said company for the accommodation of the said John Sadleir, and the said banking company never received any consideration for the acceptance or payment of the same; that when the said bill of exchange fell due the said John Sadleir was not in a condition to take up same, and the plaintiff thereupon, at the request of the said John Sadleir, consented to take, in lieu of immediate payment, the bills in said writ of summons and plaint mentioned; that said company accepted the said last mentioned bill for the accommodation of the said John Sadleir, and that there never was any value or consideration for the acceptance or payment of the said bill by the said company. That, except as aforesaid, there never was any value or consideration for the endorsement of the said bill to the plaintiff; that afterwards, and after said last mentioned bill became due, and before the commencement of this suit, the plaintiff repudiated the said agreement, and refused, and ever since has refused and still refuses, to transfer or convey the said portion of said estate to the said John Sadleir, or his representatives, in pursuance of said agreement, or in anywise to fulfil or perform the said agreement; and the said agreement is still wholly unperformed and unfulfilled by the said Thomas Joseph Eyre.

The fourth defence alleged that said bill was accepted by the said company for the accommodation of the said John Sadleir, and was endorsed to the plaintiff, under the circumstances, in the manner and for the consideration in the last preceding defence mentioned. That said John Sadleir, after the making of the said agreement, in said last preceding defence mentioned, by a certain deed of trust assigned and conveyed his interest therein to trustees, upon trusts (among others) in favor and for the benefit of the said banking company. That the plaintiff afterwards, on the 10th of July 1857, filed, in the High Court of Chancery in England, his bill of complaint, which was afterwards amended, pursuant to orders to that effect, against J. W. Burmester, Andrew Durham,

William Corry, George M'Dowell, the defendant in the present action, as official manager by and on behalf of the Tipperary Joint-stock Banking Company, William Francis Eyre, Anthony Norris and Clement W. Sadleir, as the defendants; which bill, amongst other things, stated that the plaintiff had, since the death of the said John Sadleir, which took place in February 1856, discovered that said agreement of 13th of May 1855 was a mere fraudulent contrivance by the said J. Sadleir, for the purpose of obtaining a fictitious title to the said Coolnamuck estate, and of concealing his having, in the previous year, by forgery of the plaintiff's signature, procured the Commissioners for the Sale of Incumbered Estates in Ireland to execute certain conveyances thereafter mentioned, &c.

T. T. 1862.  
*Common Pleas*  
 EYRE  
 v.  
 M'DOWELL.

The defence then set out the prayer of the bill, which was in substance that the agreement of the 13th of May 1855 should be set aside and cancelled, and that certain lots of the Coolnamuck estate should be conveyed to the plaintiff. It then alleged that the defendant, as such official manager, appeared, and did not traverse the case made by the plaintiff; but, by reason of such statement and prayer of the plaintiff in his said bill of complaint, he was induced to enter, and did then and there, as such official manager, enter a disclaimer of any interest in the subject-matter of the said suit, or in the said last-mentioned lots, or under the said deed of trust, in favor of said banking company; and thereby the defendant, as such official manager, was induced and caused to change, and did change and alter, his position as such official manager, and of said banking company; wherefore the defendant says that the plaintiff ought not now to be heard to set up, and is estopped from setting up, the validity of said agreement of the 13th of May 1855, or to recover in this action upon the said bill of exchange, &c.

The plaintiff traversed the third and fourth defences, and also replied to the fourth, that the said bill was dismissed by a side-bar order. The plaintiff also demurred to the third defence, upon the ground that it did not allege that the agreement had ever been rescinded, and that J. Sadleir, or anyone

T. T. 1862. deriving under him, had repudiated same; or that said agree-  
*Common Pleas* ment was not in full force, or that same was mutually rescinded;  
 EYRE and that it was therein admitted that said bill had become pay-  
 v. able before the alleged repudiation of the plaintiff of the said  
 M'DOWELL. agreement. He also demurred to the fourth defence, on the ground  
 that the rights of the defendant were not affected by the proceed-  
 ings in the abandoned suit, and that nothing appeared to show  
 that said agreement was not still in force. The defendant likewise  
 demurred to the plaintiff's second replication to the fourth defence.

*J. B. Murphy* (with whom was Serjeant *Sullivan*), on behalf  
 of plaintiff.

Part of the consideration for this agreement was the acceptance  
 of a third party for a portion of the purchase-money of the estate.  
 It is impossible that the third party (the bank), represented here  
 by the official manager, can escape their liability, unless a total  
 rescinding of the agreement be shown. The consideration for the  
 acceptance was not the performance of the contract to convey the  
 estate, but the contract itself: *Spiller v. Westlake* (a); *Moggridge*  
*v. Jones* (b). There is no total failure of consideration shown here:  
*Mann v. Lent* (c); *Grant v. Welchman* (d). The bill became due  
 before the alleged repudiation. With respect to the other defence,  
 the operation of the disclaimer was confined to the suit in which  
 it was pleaded. That suit was subsequently abandoned; and no  
 change was made in the position of the bank, in consequence of  
 the disclaimer: the disclaimer was not induced by any misrepresen-  
 tation of fact: *Pickard v. Sears* (e); *Howard v. Hudson* (f);  
*Clarke v. Hart* (g). At all events, the dismissal of the suit is an  
 answer to the defence.

*P. McKenna* and *C. R. Barry*, contra.

The bank, having been an accommodation acceptor, is precisely

(a) 2 B. & Ad. 155.

(b) 14 East, 486.

(c) 10 B. & C. 877.

(d) 16 East, 207.

(e) 6 Ad. & Ell. 469.

(f) 2 El. & Bl. 1.

(g) 6 H. of L. Cas. 633.

in the same position, as regards the plaintiff, as if the previous suit had been against J. Sadleir, the drawer of the bill. In many of the cases relied upon at the other side, there had been a part performance of the contract. In *Spiller v. Westlake*, the plaintiff had not, as here, repudiated the contract. A mere right of action is not a valuable consideration for an acceptance: *Wells v. Hopkins (a)*. It is no answer to say that a suit might be brought against the plaintiff for specific performance of the agreement to convey the estate. No performance would be decreed, where its enforcement might be injurious to third persons; it could not be enforced by Sadleir's representatives: *Twining v. Morrice (b)*. A total failure of consideration is an answer to the action: *Astley v. Johnson (c)*; *Pugh v. Robinson (d)*; *Glazebrook v. Woodrow (e)*. The effect of the disclaimer was to lead to the abandonment of the suit in Equity in which it was pleaded. The defendant could not afterwards retract; and therefore the case comes within Lord Denman's decision in *Pickard v. Sears*; and the plaintiff is bound by his repudiation of the contract: *Simpson v. Accidental Death Insurance Company (f)*.

T. T. 1862.  
Common Pleas  
EYRE  
v.  
M'DOWELL.

Serjeant *Sullivan* replied.

*Cur. ad. vult.*

MONAHAN, C. J.

June 16.

This case comes before the Court upon demurrers, filed by the plaintiff, to two special defences of the defendant. The action is brought against the defendant, the official manager of the Tipperary Joint-stock Bank, on a bill of exchange, drawn by John Sadleir upon the bank, dated the 26th November 1855, for the sum of £17,000, payable six months after date, accepted by the bank, and endorsed by Sadleir to the plaintiff.—[His Lordship then proceeded to state the third and fourth defences to the summons and plaint.]—Now, the first question which arises upon these demurrers is, whether the mere non-performance of the agreement

(a) 5 M. & W. 7.

(b) 2 Bro. C. C. 326.

(c) 5 H. & N. 137.

(d) 1 Esp. 136.

(e) 8 T. R. 367.

(f) 2 Com. B., N. S., 257.

T. T. 1862.  
Common Pleas

EYRE  
v.

M'DOWELL.

by the plaintiff, and his refusal to convey the estate, is a defence to the action? We are of opinion that it cannot have such an effect; and we consider that the case of *Spiller v. Westlake* (a) bears strongly upon this question. Indeed the facts there were stronger in favor of the defendant than in the case now before us. That was an action, by the payee, against the maker of a note for £200, payable on the 2nd February 1830, and there was an agreement by the plaintiff, made concurrently with the making of the note, whereby the plaintiff undertook, in consideration of £200, paid and secured, and of £1140 to be paid on the 2nd February then next, to convey certain lands to the defendant. It appeared that the promissory note, which was passed to secure the £200 mentioned in the agreement, became due on the day upon which the balance of the purchase-money was to be paid, and the lands to be conveyed. The defence pleaded was, the general issue, in the old form; and evidence was given to show that the plaintiff was not in a situation to convey, and did not in fact do so at the time stipulated, or, as I collect, at all; and thus the question arose, whether the fact of the non-conveyance and non-performance of the agreement was a defence to the action? The Court was of opinion that if the agreement were contained in one instrument, and that its effect were that the money should be paid and the conveyance executed on the same day, that the non-performance of the plaintiff's part of the contract would be a defence to the action for the purchase-money: but they held that the fact of a negotiable security having been taken separately from the instrument containing the agreement, showed that the intention of the parties was, that the note should be paid at all events; and they accordingly refused to set aside the verdict found for the plaintiff.

Independently of that case, there is the case of *Moggridge v. Jones* (b), and several others to which I need not refer, which establish the principle that where an agreement is entered into, the consideration for which is a promise to pay money on a particular day, and where, by its terms, the time for performing the agreement may be a day subsequent to that fixed for the

(a) 2 B & Ad. 155.

(b) 14 East, 486.

payment of the money, there, from the very nature of the transaction itself, the agreement to perform, and not the actual performance, is to be regarded as the consideration. So here, it was agreed that a bill of exchange was to be given, payable on a particular day. There was an agreement on the part of Eyre to convey, but no time was fixed for the conveyance; and that time might not have arrived when the bill became due. Therefore it would be impossible to hold, in this case, that the execution of the conveyance was the consideration of the bill. On the contrary, the consideration for the giving of the bill was the promise to execute a deed of conveyance. In fact, the first bill became due several months before the plaintiff was asked to convey, and before the time for executing the deed had arrived; and the reason stated in the pleadings for the accepting the bill of exchange now sued on, is not the fact of any difficulty to make out title or inability to perform the plaintiff's part of the agreement, but that John Sadleir was not in a state to pay the original bill; so that in fact the consideration of the present bill, now sued on, was an overdue bill, for the payment of which the present bill was given. It is not suggested the defendant could have had any defence.

Having said so much as to the refusal to convey, relied upon in the present defence, I next come to the other allegation—namely, that the plaintiff Eyre repudiates the agreement. It is not alleged that John Sadleir or his representatives assented to this repudiation; and it requires no authority to show that, without the assent of the other party, one party to an agreement cannot put an end to it. If both concur, then it becomes an act of rescision; and, in that case, if money had been paid on foot of the contract, it might be recovered back, provided the agreement were totally rescinded. But there is nothing here to show that Sadleir had not a perfect right to sue on this, as a binding agreement, so far as Eyre was concerned; and therefore as the repudiation, by one party, is no rescision of the contract, we are of opinion that the demurrer to this defence is well founded. Then, as to the other defence, that states, in addition to the matters



T. T. 1862.  
*Common Pleas*

EYRE  
 v.

M'DOWELL.

stated in the previous defence, that Eyre filed a bill in the Court of Chancery in England, stating that the agreement was fraudulent, and praying that he might not be bound to perform it; and that he made Mr. M'Dowell a party to that bill; and that the latter, acting on the statements on that bill, filed a disclaimer; and that the bill was afterwards dismissed for want of prosecution. Is it possible that that can be a defence to the present action? It was argued that the case of *Pickard v. Sears*, which is now so constantly cited, both here and in Westminster, in the absence of other authority bearing on the case, establishes the principle that wherever one party makes a representation to another, and the other, in consequence, changes his condition, that the party making the representation is estopped, and cannot controvert the existence of the state of facts which induced the other party to alter his condition. It is accordingly said that the defendant changed his condition, by the disclaimer which he was induced to make. We have no doubt but that *Pickard v. Sears* is good law, as explained by *Howard v. Hudson* (a) and by *Freeman v. Cooke* (b); and the rule now established is, that the mere fact of a man having made a representation, will not bind him afterwards, unless he, in terms, make it to a party in order to induce him to do a particular act; and therefore it must be made, not only to the other party, but likewise for the express purpose of his acting upon it, and the other party must have acted so as to alter his condition in consequence of the representation so made to him. So the law is laid down in *Howard v. Hudson* and in *Freeman v. Cooke*. With respect to the statements contained in this bill, filed in the Court of Chancery, everybody knows that, except for the purposes of the suit, the statements in a bill are no evidence against the plaintiff of the truth of the facts so stated. It therefore occurs to us impossible to hold that the plaintiff Mr. Eyre made the statements contained in the bill filed by him, to the defendant M'Dowell, for the purpose of inducing him to file a disclaimer in the cause, which, as far as we see, was filed without any communication with the plaintiff, and not in consequence of any act

(a) 2. Ell. & Bl. 1.

(b) 2 Exch. 660.

or representation of his. Further, how can it be said that, by the filing of a disclaimer, in a suit which had been dismissed for want of prosecution, the condition of the defendant is in any way altered or prejudicially affected?

T. T. 1862.  
*Common Pleas*

EYRE  
v.

M'DOWELL.

Therefore, we are of opinion that neither of these pleas can be sustained, and that the demurrers are well founded. We stated, on a former occasion, when liberty was sought to file equitable defences, that the Court of Chancery was the proper Court to resort to for relief; and nothing we have said here, in holding these pleas to be bad, is to be taken as expressing any opinion of ours that the defendant may not have ample relief in the Court of Chancery. All we decide is, that these pleas amount to no legal defence in bar of the plaintiff's action: and therefore we must allow the demurrers taken by the plaintiff to defendant's pleas.

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BENNETT v. SCOTT.

E. T. 1862.  
*April 30.*

T. T. 1862.  
*May 30.*

THIS was an application on the part of the plaintiff, for a certificate, pursuant to the 97th section of the Common Law Procedure Amendment Act 1856, that the cause was one which could not have been tried in the Civil-bill Court; or that, although it could have been tried in the Civil-bill Court, it was a fit case to be tried in one of the Superior Courts.

An action was brought for the breaking of a dam, and thereby causing an unusual quantity of water to flow to the plaintiff's mill, so as to obstruct the working.

The first count of the summons and plaint stated, that before and

The second count charged

the defendant with having deepened the channel of a certain stream, and having caused same to flow in an unusual direction, so as to damage the plaintiff's premises. The defendant pleaded to both counts, by way both of denial and justification.

The case was referred, at the trial, to arbitrators, whose award was to be entered as the verdict of the jury, and they ultimately found for defendant on the first count, and for plaintiff on the second count.—*Held*, upon a motion for a certificate, under the 97th section of the Common Law Procedure Amendment Act 1856, that the case was fit to be tried in one of the Superior Courts, notwithstanding that the parties resided within the same jurisdiction, that in consequence of the reference, the Court had jurisdiction to grant the certificate at this stage of the cause, and that it was a proper case for so doing.

E. T. 1862.  
*Common Pleas*  
 BENNETT  
 v.  
 SCOTT.

at the time of the committing of the grievances by the defendant, the plaintiff was lawfully possessed of a certain mill and premises, with the appurtenances, near unto a certain stream of water running near the said mill and premises; and by the side and bank of which said stream, there then was, and of right ought to have been, &c., a certain dam or barrier for the purpose of preventing the water of the said stream from running to the said mill; yet the defendant, on the 1st of December 1858, and on divers other days, cut open, destroyed and removed the said dam or barrier, and thereby and otherwise caused divers large quantities of the water in the said stream to flow to the said mill of the plaintiff, which would otherwise have run and flowed away from the same; and also caused quantities of the water of said stream to be penned and forced back against the wheel of the plaintiff's mill; and thereby the plaintiff was on those several days and times hindered and prevented from working his said mill so extensively and advantageously as he otherwise would have done, &c. &c.

The second count was for having wrongfully widened, deepened and enlarged the bed and channel of a certain stream, and having kept and continued same widened, deepened and enlarged, and thereby having prevented the water of said stream from running and flowing along its usual and regular course, and in its usual calm, moderate and smooth manner, unto and past the lands and premises of the plaintiff, as the same would have done; whereby the water of the said stream ran and flowed in a different direction or channel, and with much greater force, &c., unto and against the bank and premises of the plaintiff, and damaged same, &c.

The third count charged the defendant with having broken and entered the plaintiff's lands and dug up the soil, and taken divers cart-loads of earth and stones, &c.

The fourth count was in part for the conversion of divers loads of clay, gravel, and sand.

The defendant pleaded first, to first count, a denial of the plaintiff's right to the dam or barrier, as alleged.

Secondly and thirdly, to first count, pleas justifying the removal of said dam and barrier by the defendant, as a riparian proprietor.

Fourthly, to so much of first count as complained of the cutting off and removing said dam, and thereby causing said water to flow as therein mentioned, a denial of so much of the complaint.

E. T. 1862.  
*Common Pleas*  
BENNETT  
v.  
SCOTT.

Fifthly, to second count, a traverse of the widening, &c. &c., of the bed or channel.

Sixthly, to second count, a plea of justification.

Seventhly, to second count, that the causes of action, or any of them, &c., did not, nor did any of them, accrue within six years before the commencement of the suit.

Eighthly, to third count, a denial of the breaking and entering.

Ninthly, to third count, that the lands therein mentioned were not, at the time therein mentioned, the lands of the plaintiff.

Tenthly, to third count, a plea justifying so much of the alleged trespass as complained of the entering, digging up the soil, &c., the breaking to pieces, damaging and spoiling points of earth, &c., on the ground that the plaintiff had encroached on the adjoining land of defendant.

Eleventhly, to fourth count, a denial of the alleged conversion.

Twelfthly, a denial that the goods therein mentioned, were the goods of the plaintiff.—Issues accordingly.

The cause came on for trial before the Lord Chief Justice, at the Queen's County Summer Assizes of 1861. After the jury had been sworn, it was suggested that the case might more conveniently be referred to the award of three of the jury; a consent was accordingly entered into between the plaintiff and the defendant, that all matters in dispute in this action be referred to Henry S. Perry, George Neale, and Charles Thompson, three of the jurors, &c.; the Registrar of the Lord Chief Justice to enter a verdict for either party, and to fill up the issue paper according to such finding, &c.; that such award be made by them, or any two of them, within one month from the date thereof, or such other time as they or any two of them should appoint; and with full liberty to examine witnesses, and receive evidence on oath, and call for documents, and to call in the assistance of an engineer, &c.; the costs of said engineer and arbitration, to be costs in the cause. On the 5th of August following, the arbitrator made the following award:—

E. T. 1862. *Common Pleas*  
 BENNETT  
 v.  
 SCOTT.

"We are of opinion that the water of the river Gully, on its arrival at the dam or barrier situate at the junction of the baronies Clanwallagh, Uppercross, Maryborough West, separated itself into two parts; one portion (that being the greater) passing by the points marked E and O, on the plan on which we have inscribed our initials (which accompanies the award), to the bridge of Gutnaclea; and the other, being the lesser portion, by the barony boundary (A B), to a junction with the first portion at the point marked F on the plan of award.

"We find that the channel on the barony boundary between the parts marked X and B, on the plan referred to, was sunk to a depth of 18 inches; and that filling should be restored or a weir or work placed in substitution of same, to that original level at letter X; which weir or work should have its crest at the level of two feet, under the head of a stake on the dam at present existing at letter X. We are further of opinion that all the other obstructions in both channels should be removed at the joint expense of plaintiff and defendant."

(Signed). "CHARLES THOMPSON.

"GEORGE NEALE.

"HENRY S. PERRY."

"Dated the 5th of day of August 1861."

In the following Term the plaintiff applied to this Court for an order that a verdict for nominal damages, with full costs, be entered for him; or if the Court were of opinion that the award of the arbitrators was imperfect, and that the matters therein mentioned were insufficient to enable the Court to adjudicate upon the rights of the parties, that the Court do refer the matter of the submission back to the arbitrators for their consideration and adjudication, and with such directions as the Court should think fit. Upon hearing this motion, the Court ordered that the matter of the submission in this case be referred back to the arbitrators for further consideration, and that said arbitrators do insert on the issue papers replies to the several queries contained therein, &c.

The arbitrators accordingly found for the defendant on the first,

second and third issues, and for the plaintiff on the fourth, fifth, sixth and seventh. They did not find on the remainder of the issues. They assessed damages in favor of the plaintiff at £2. 10s. The findings were afterwards endorsed on the *postea*, and judgment entered for the plaintiff.

E. T. 1862.  
*Common Pleas*  
 BENNETT  
 v.  
 SCOTT.

*J. T. Ball* (with whom was *Levinge*), in support of the above motion.

The arbitrators had no jurisdiction to grant such a certificate, nor could the Judge at the trial have done so by anticipation; consequently the Court above have power to do so, and the application is not too late. The action was brought to establish a right, which the verdict, though for a nominal amount, has established. *M'Alister v. Callan* (a) is precisely in point.

*Macdonogh* and *Martin*, contra.

The plaintiff has made no affidavit in support of this motion. The first, second, and third issues, on the first count, have been found in favour of the defendant; and that portion of the record alone involves any question of right. The Court has no jurisdiction to entertain the motion. The order of reference ought to have reserved power to the arbitrators to give a certificate for costs. Wherever a trial, or a proceeding equivalent thereto, takes place, the certificate ought to be given by the presiding Judge or officer: *Brophy v. Jones* (b); *Cooper v. Pegg* (c); *Reid v. Ashby* (d); *Wigens v. Cooke* (e); *Swinglehurst v. Altham* (f); *Wallen v. Smith* (g); *Perry v. Dunne* (h).

*Levinge*, in reply.

*Cur. ad. vult.*

(a) 4 Ir. Jur. N. S., 4.

(b) 8 Ir. Com. Law Rep. 240.

(c) 16 C. B. 264.

(d) 13 C. B., N. S., 897.

(e) 6 C. B., N. S., 784.

(f) 3 T. R. 138.

(g) 5 M. & W. 159.

(h) 12 Law Jour., N. S., Q. B., 351.

T. T. 1862.

*Common Pleas*

BENNETT

v.

SCOTT.

May 30.

MONAHAN, C. J.

This case comes before the Court upon an application, on the part of the plaintiff, for a certificate or order, pursuant to the 97th section of the Common Law Procedure Amendment Act (1856), either that the cause was one which could not be tried in the Civil-bill Court, or, though it could be tried in the Civil-bill Court, that it was a fit case to be tried in the Superior Court. The facts of the case, so far as we can collect them from the pleadings, the affidavit of the defendant (none having been made by the plaintiff), and some documents produced in Court by Mr. Courtenay, the Registrar of the Lord Chief Justice, are these:—The action was brought against the defendant, to recover damages for the alleged disturbance of a water-course, to which the plaintiff claimed to be entitled. The summons and plaint contained several counts, and the defendant pleaded several special pleas, in which he asserted a right to the water, and justified the acts done by him. The case was originally tried in the county of Kildare, before the Lord Chief Justice and a special jury, who were unable to agree to a verdict. It appears that an order was subsequently made to change the venue from Kildare to the Queen's County, upon the allegation that a view would be material and necessary for the fair trial of the action. Accordingly the record came down for trial at the Queen's County Summer Assizes of 1861; and I collect, partly from the statement of Counsel, and partly from the affidavit before the Court, that the jury consisted of the viewers, and of others who had not seen the premises. After the jury was sworn, it occurred to the parties that, from the nature of the case, it would be more satisfactory not to have it tried in the ordinary way, but to have it referred to some members of the jury. The names of the twelve jurors who had answered were thereupon put into a box, and three arbitrators were selected from it by lot. It was then agreed that the decision of two out of these three should be binding, and that they should fill up the issue paper for the whole twelve jurors; and Mr. Courtenay was directed to make up the *postea* from the issue paper, so to be filled up by the arbitrators, as if the verdict had been had before the Lord Chief Justice. The three jurors were a considerable time in

making their award, and they did not make it in compliance with the terms of the reference. They did not answer the issues *seriatim*, as they ought to have done. The matter came before this Court, and we returned the issue paper to the arbitrators, with directions to fill it up correctly, which they did, with the assistance of Counsel, finding some of the issues for the defendant, and others for the plaintiff. There was however this difference between the respective findings, that, as regards those in favor of the defendant, the arbitrators were unanimous; whereas two only agreed to the findings made in favor of the plaintiff, and the third arbitrator dissented. However, no application could be made to us to disturb these findings, founded on this circumstance, nor was any question raised but that they should be entered on the *postea* as the verdict of the jury; and accordingly they were so entered, with £2. 10s. 0d. damages, and the plaintiff entered judgment, and furnished his costs for taxation. It appearing, then, that both parties resided within the same Civil-bill jurisdiction, it was insisted, before the Taxing Officer, that he had no power to tax the costs, plaintiff not being entitled to any, under the 97th section of the Act of 1856. This matter is now brought before us for the purpose of obtaining from the Court an order or certificate, such as I have stated, to do so. The terms of consent, entered into at *Nisi Prius*, to refer the cause, were as follows.—[His Lordship read the consent.]—The question at present before us is, whether or not this Court has jurisdiction to grant the order or certificate, as sought for? The defendant says that there has been, in point of fact, a trial in this case, and therefore that, under the Act, the Court has no jurisdiction to make the order, and that the certificate should have been obtained from the Lord Chief Justice. The plaintiff, on the other hand, says that there was no such trial here as the Act of Parliament contemplated; which ought to be a trial presided over by a Judge, who would thus have had an opportunity of exercising his discretion with reference to the propriety of granting or withholding a certificate: that, although it could not be denied that the jury were sworn, yet that the verdict was not, in point of fact, found by them; and that the foreman of the jury did not, if that were material, even go through the form of

E. T. 1862.  
*Common Pleas*  
 BENNETT  
 v.  
 SCOTT.



E. T. 1862.  
*Common Pleas*

BENNETT

v.

SCOTT.

signing the issue paper, having refused, I believe, to do so unless he and the other jurors got the usual special jury fee of twelve guineas. The first question which arises is, is this a cause in which the Chief Justice could, or ought, to have granted a certificate, under the section of the Act referred to? It has been said that it is customary to ask the Judge to give a certificate, when the jury have retired to consider their verdict; but it should also have been said that such is the practice where the parties assent that the verdict may be received by the Registrar, in the absence of the Judge. The question here however is, whether the Judge had any jurisdiction whatever, in the present case, to grant a certificate, pursuant to the 97th section of the Act of Parliament?—[His Lordship read the section.]—It appears to me as perfectly clear that, until the case has terminated, and the Judge knows what the finding of the jury is, it is impossible for him to give any certificate. There may be several counts in the declaration, with an issue raised upon each; the jury may find some of the issues in favor of the plaintiff, and the remainder for the defendant; and therefore I think that it never was contemplated by the Act of Parliament that the Judge should certify until the termination of the trial. In *Brophy v. Jones* (a), it was decided that the Judge must certify at the trial; and that, if he should do so on the day following, the certificate would not be within the Act of Parliament. Now, what are the facts before us? The case was called on, and immediately referred, in the way I have already mentioned. It cannot vary the construction of the Act, as applied to this case, that it so happened that the Chief Justice might have known, from the former trial, what were the facts. Here a very serious question would necessarily depend upon the findings which the jury would make, as to whether it were a proper case in which to grant a certificate; and therefore, when the case was referred, it was not proper for the Chief Justice then to decide upon the granting of a certificate; he moreover could not have done so during the Assizes, inasmuch as nearly six months elapsed before the completion of the award. It may then be said that provision ought to have been made in the order of reference

(a) 8 Ir. Com. Law Rep. 240.

that the three jurors, who undertook the reference, should have power to grant the certificate. But the answer to that simply is, that the plaintiff or his Counsel, in all probability, would not consent that such a power should be delegated to three country gentlemen, being advised it was his right to have the certificate from the Court; and I confess that I, for one, if acting as Counsel for a plaintiff, would never advise him to submit his right to costs, in such a case, to such a tribunal.

E. T. 1862.  
*Common Pleas*  
 BENNETT  
 v.  
 SCOTT.

The question then we have to decide is, is this a case in which we have jurisdiction under the statute, to make the order required? I think it impossible to doubt that the intention of the Legislature was, that if the case was one which could not or ought not to be tried in the Civil-bill Court, the plaintiff should be entitled to the costs of the proceedings in the Superior Court; and that in all such cases there either should be a trial or there should not: if a trial, the Judge before whom the trial was had is the person to certify; if no trial, the Court in which the action is pending. This being, as far as I can form an opinion, the intention of the Legislature, it would seem to follow that the Court should have the power to grant the certificate or make the order, in any case in which there has not been a trial at which a Judge could have granted the certificate. This however, does not depend on mere abstract reasoning, because it appears that the Court of Queen's Bench, on the 3rd of November 1858, in the case of *M'Alister v. Callan* (a), decided this very question. In consequence of a suggestion that there may have been some inaccuracy in the report of that case, I have obtained a copy of the order made by the Queen's Bench; by which it appears that the case actually went down to trial, that the jury were sworn, and the case was then referred to three of the jury, who filled up the issue paper; and, consequently, that case is identical with the one before us. The findings were afterwards amended by consent, and then the question arose, as to whether the Court had jurisdiction to make an order? It was argued there, on behalf of the plaintiff, that there had been no trial, inasmuch as the case had been referred to arbitrators, who had no power to certify; and although on reading

(a) 4 Ir. Jur., N. S., 4.

E. T. 1862.  
*Common Pleas.*

BENNETT

v.

SCOTT.

the record it would appear as if the cause had been tried, yet in point of fact the case was one in which it would have been impossible that the Judge could have granted a certificate. On the other side it was admitted that, though it appeared by the record that there was a trial before a Judge, yet that in fact there was none. The Lord Chief Justice said that, though there had been a sort of trial, yet that by consent the matter had been referred to parties under circumstances in which the Judge could have no power to certify, and therefore, that there had not been such a trial as in point of fact gave the Judge power to grant a certificate; and by the order, which I now hold in my hand, a certificate was granted such as we are now called on to make. Are we now to overrule that case? The case has been argued very fully by Mr. *Maedonogh* and Mr. *Martin*, on behalf of the defendant, and they have referred us to several cases decided in England, and particularly to the case of *Cooper v. Pegg* (a). The facts of that case were these:—By an order of *Nisi Prius*, a verdict was entered for the plaintiff for £500 damages, subject to the award of an arbitrator, to whom the case was referred, and who was thereby empowered to change the verdict either into one for the defendant, or into such amount for the plaintiff as he should think proper. He ultimately directed that the verdict for the plaintiff should stand, but that the damages should be reduced to one farthing. The question then arose, not as here, whether the Court had jurisdiction, but whether the plaintiff was entitled, *ex debito*, to get his costs, and that depended upon the terms of the 2nd section of the English Act, the 3 & 4 *Vic.*, c. 24, which is very different from the Act in force here. The substance of that enactment is, that where parties shall recover by the verdict of a jury less than 40s., they shall not be entitled to costs, unless the Judge shall certify; but it does not provide for any other case than that of a certificate to be granted by a Judge or other presiding officer. In case that there were no verdict, and that judgment were otherwise obtained, no matter how frivolous might have been the cause of action, the officer would have had no alternative but to tax the plaintiff's costs; but in the

(a) 16 C. B. 264.

case referred to, as the Court were unable to say that the judgment had not been obtained on a verdict by a jury, they held that the plaintiff was not entitled to costs, and that the Taxing-officer had no jurisdiction.

E. T. 1862.  
*Common Pleas*

BENNETT  
v.  
SCOTT.

If the case before us raised a perfectly new question, and if there were no decision bearing expressly upon it, it would be arguable whether we ought to adopt the principle of the case I have just referred to. In a more recent case of *Wigens v. Cook*(a) the Court held that the plaintiff was entitled to costs, because the finding was not in point of fact the verdict of a jury; but in the other case it was held that it substantially was the verdict of a jury. But the Court of Queen's Bench in this country having decided, in the case of *M'Allister v. Callan*, that there was not such a trial as came within the meaning of the Act, and the Profession being aware of that decision, and having probably acted on it, and advised their clients in such cases to consent to a reference to one or more of the jury, it occurs to me that it would be not only unreasonable, but actually unjust on our part, now to say that we would not abide by that decision, even though, if we were considering the case for the first time, we might possibly come to a different conclusion.

We are therefore of opinion that we have jurisdiction to make the order sought for; but on the other hand we think that the facts are not sufficiently before us. We think that affidavits should be made, showing the nature of the case made before the arbitrators, and also the portions of the pleadings on which the plaintiff succeeded. This is not the case of a party making an insufficient affidavit, but it is one in which he has omitted to make any affidavit. We will therefore allow him to supply this defect; but having now decided that we have jurisdiction to entertain this application, we shall not permit that question to be re-opened.

CHRISTIAN, J.

In assenting to the judgment of the Court, I must be understood as doing so solely upon the authority of the case before the Court of Queen's Bench in Ireland. The report of that case, as it is

(a) 6 C. B., N. S., 784.

E. T. 1862.  
*Common Pleas.*

BENNETT  
v.

SCOTT.

given in the *Jurist*, is not satisfactory. It is impossible to say how far the precise question before the Court here came before the Court of Queen's Bench: manifest inaccuracy has crept into the report. I entirely acquiesce that nothing could be more inconvenient than that, in questions of this description, a different rule of practice should prevail between different Courts in this hall; but if it had not been for that decision, I confess that I should have been disposed to follow the authority of *Reid v. Ashby (a)*; a case which does not appear to have been brought before the notice of the Queen's Bench on that occasion; and which, although not an express authority on the matter before us, sufficiently shows what is the meaning of the word "trial" as used in this section of the Act; and that what has taken place in this case amounted in point of fact to a trial. But inasmuch as the case in the Court of Queen's Bench is an express decision upon this point to the contrary, and it would be both inconvenient and unjust that a different rule should prevail here, in a matter rather of practice than of law, I accede to the authority of the latter case. It must however be clearly understood that our rule upon this motion does not refer to the further question which will arise under the 103rd General Order.

BALL, J.

I abstain from saying more than that I consider the Court has jurisdiction to grant the certificate.

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In consequence of the order of the Court on the above motion, the plaintiff made a voluminous affidavit, in which he gave a history of his dispute with the defendant. The affidavit stated that the plaintiff had a mill upon the lands of Gortnaclea, in the Queen's County, the defendant being the owner of the adjoining lands. A small river, named the "Gully," flowed along the lands of the plaintiff and the defendant, and supplied the water of the mill-race of the former. From the tail-race of the mill, a sunk boundary fence ran down as far as the Gully, but had been so separated from it by a bank of earth or dam, the removal

(a) 13 C. B. 897.

of a portion of which, by the defendant, was one of the present causes of action. The plaintiff alleged that, before the defendant had come into possession of his part of the land, which was in 1856, the plaintiff and the former occupier, named Joist, had, at their joint expense, deepened and repaired what had originally been a mearing fence, and on so doing had taken care to maintain the dam which separated the extremity of this from the river, so that no water from the Gully should flow into it; but that the defendant afterwards, upon three several occasions, against the plaintiff's remonstrance, had dug through a portion of the dam, and had cut down the dam deeper than the bottom of the boundary fence; and, by so doing, sunk down the bed of the river; in consequence of which, the water of the Gully had flowed into the tail-race, and had impeded the working of the mill. The defendant answered this, by an affidavit, denying the plaintiff's right to the easement of the dam, and alleging that the water in the ditch was usually supplied by the river, the natural course of which was disturbed by the dam. He also denied the fact of having deepened the bed of the river, in the manner stated by the plaintiff. Both affidavits likewise referred to what had taken place before the arbitrators, on the occasion of the reference. The plaintiff asserted that he himself waived insisting on substantial damages, being satisfied to take nominal damages, so as to establish the right. The defendant, on the other hand, alleged that the finding on the sixth issue was not unanimous; that the two arbitrators who found for the plaintiff had, previously to his attorney expressing himself satisfied with nominal damages, intimated that they would only award £2. 10s. 0d.; and that the finding against him on the issue on the second count, for deepening the bed of the river, was not justified by the evidence before the arbitrators.

T. T. 1862.  
*Common Pleas*  
 BENNETT  
 v.  
 SCOTT.

*J. T. Ball* (with whom was *Levinge*) now renewed the motion, and moved for a certificate, under the 97th section, to entitle the plaintiff to costs. This case involves a question of title, which has been found in favor of the plaintiff: *Coggins v. Gibblin* (a); *Orr v. Cahill* (b).

May 30.

(a) Ir. C. R. 467.

(b) 1 Cr. & D. 567.

T. T. 1862.  
*Common Pleas*

BENNETT  
v.  
SCOTT.

*Macdonogh* and *Martin*, contra.

The three first defences to the first count, which alone involves a question of title, have been found for the defendant. The fourth defence, which was found for the plaintiff, was only pleaded to a portion of the first count. The second count did not involve a question of right, but only of damage. The question was, whether the ditch was the natural stream of the Gully flowing into the tail-race, or a dry ditch. The proposition that injuries to land are not triable in the Civil-bill Court, is not maintainable. This action ought to have been tried in the Civil-bill Court.

They cited *Smith v. Harner* (a); *Coppinger's Civil-bill Practice*, p. 127.

MONAHAN, C. J.

We are of opinion that this certificate must be granted. We exclude the first count of the summons and plaint from our consideration. We think that the averment in the second count substantially is, that the plaintiff, as the owner of a certain mill, is entitled to have the water of the river to flow in the course in which it has flowed from time immemorial to his mill, and that the defendant has prevented its flowing in that way. What the defendant says is, that the water of the river ought of right to flow in a particular manner along and adjoining his lands; and he justifies the alleged disturbance, by his acts, on that ground. The issue upon that was, whether that defence was true in substance and fact? There is particular mention in some of the affidavits as to the grounds on which Serjeant *Sullivan* directed the arbitrators to find their award. Mr. Scott however deposes that nothing of this kind occurred in his presence. We do not make that the ground of our judgment. Mr. *Levinge* has contended that the acts complained of, whether right or wrong, were connected with the bed of the river, the former level of which had been altered to the extent of eighteen inches, and that a dam should necessarily be placed across the river, to make the water to the height

(a) 3 C. B., N. S., 629.

Mr. Bennett was entitled to have it; and that consequently the Civil-bill Court would have no jurisdiction to entertain the case. I have great doubt whether, if such a case had come before the Chairman of Quarter Sessions, and afterwards before the Judge, on appeal, they would have had any jurisdiction in the matter. But, independently of that, we entertain no doubt, from the nature of the case, the difficulty of conducting it, and the witnesses necessary to be examined, that it was one proper to be tried in a Superior Court. It may turn out that Mr. Bennett will take but little by this motion, as the defendant will be entitled to the costs of the issues found for him; but we cannot speculate on that; we must, for the reasons I have stated, grant a certificate, the effect of which will be to show that this was a case in which the plaintiff was entitled to costs, though the parties resided within the same civil-bill jurisdiction; but whether, under the 243rd section of the Common Law Procedure Act of 1853, the plaintiff is entitled to full or only half costs, it is premature for us to decide: this is a matter for the Taxing-officer, in the first instance.

T. T. 1862.  
*Common Pleas.*

BENNETT  
v.  
SCOTT.

Rule accordingly.

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CAHILL and wife v. M'DOWALL.

E. T. 1862.  
*May 12.*

ACTION for money received by the defendant for the use of the plaintiffs. The summons and plaint stated that the defendant was summoned to answer the complaint of James Cahill and Mary Cahill, the plaintiffs, who complained that the defendant was indebted to them in the sum of £22 sterling, money payable by the defendant to the plaintiffs, for money received

In an action by A, jointly with B his wife, to recover from D a sum of £22, "money received by the defendant for the use of the plaintiffs," the defendant

demurred, upon the ground, amongst others, that it did not appear whether A was suing in his own right or in the right of his wife.—*Held*, that it ought to have appeared from the summons and plaint in what interest B had been joined as co-plaintiff with A; and that, notwithstanding the Common Law Procedure Act 1853, secs. 84-7, the misjoinder was the subject-matter of a demurrer.



E. T. 1862. by the defendant for the use of the plaintiffs, the particulars  
*Common Pleas* of which were stated thereon, &c.—The endorsement of particu-  
 CAHILL lars was as follows:—  
 v.

M'DOWALL.

"To amount of eleven weeks' instalments of a certain sum  
 of £150, retained by the defendant to be paid to the  
 plaintiff, Mary Cahill, at the rate of £2 per week ... £22 0 0"

Demurrer—"Because it is not stated, or shown how or in what  
 "right, the plaintiffs are suing, or how the defendant is indebted to  
 "them, or how money was received by the defendant for their use;  
 "and because it is not stated or shown how the defendant is indebted  
 "to the plaintiff Mary Cahill, or how money was received by him  
 "for her use; and because it does not appear whether the said  
 "James Cahill is suing in his own right or in right of his said  
 "wife, or in respect of a cause of action accruing before or sub-  
 "sequently to his marriage with his said wife."

*H. FitzGibbon*, in support of the demurrer.

The action has been brought against husband and wife; and yet  
 the summons and plaint does not show in what right the latter  
 has been joined. It is necessary that such should appear. The  
 ground of action ought to be stated, from which it could be inferred  
 that the wife had an interest. It cannot be treated as a misjoinder.  
 The cause of action may have arisen to the wife before marriage.  
 The money might be claimed as due to the wife as executrix;  
 or the cause of action may have arisen in right of the wife since  
 marriage.

He referred to the following cases:—*Abbott v. Blofield* (a);  
*Serres v. Dodd* (b); *Bidgood v. Way* (c).

*W. Ryan* and *T. Harris*, contra.

Since the passing of the Common Law Procedure Act, there  
 has been no instance of a demurrer for a misjoinder of parties.  
 This cannot be considered as anything more. It was a mistake  
 therefore to demur. By the Common Law Procedure Act, 1853,

(a) Cro. Jac. 644.

(b) 2 Bos. & Pul. N. R. 405.

(c) 2 Wm. Bl. 1236.

secs. 84-87, the whole course of pleading was altered. The object of those sections appears from the following passage in the report of the Common Law Commissioners:—"In actions on contract, the omission of a party as plaintiff who ought to be joined, "or the joinder of a party as plaintiff who ought not to be joined, "may be fatal to the action," &c. "These rules often lead to a "defeat of justice; and we think the law in this respect may be "altered with advantage. We therefore propose, as to the joinder, "that the joinder of too many plaintiffs shall not be fatal to any "action, but that the plaintiff or plaintiffs entitled may recover."—[CHRISTIAN, J. The objection here is not so much for a misjoinder of parties, as for a misdescription of the cause of action. (He referred to *Bird v. Peagrim*) (a).]—The policy of the law now is to discourage demurrers for mere matters of form: the 81st section of the Irish Common Law Procedure Act shows that.

E. T. 1862.  
Common Pleas  
CAHILL  
v.  
M'DOWALL.

They also referred to several of the sections of the English Common Law Procedure Act, and cited the following cases:—*Coppinger v. Quirk and wife* (b); *Ruckley v. Kiernan* (c); *Hilliard and wife v. Hambridge* (d); *Sloper v. Cottrell* (e); *Bourne v. Maittaire* (f); *Martin v. M'Hugh and another* (g).

*R. Armstrong*, in reply, cited *Johnson and wife v. Lucas* (h), *Bellingham v. Clark* (i); *Roche v. Colclough* (k).

*Cur. ad. vult.*

MONAHAN, C. J.

This case comes before us on a demurrer to the summons and plaint. The latter states that the defendant is indebted to the plaintiffs in the sum of £22, for money received by the defendant for the use of the plaintiffs, the particulars of which are endorsed thereon. It will be observed that the summons and plaint refers to the endorsement; we are therefore at liberty to

May 12.

(a) 13 C. B. 639.

(b) 4 Ir. Com. Law Rep. 444.

(c) 7 Ir. Com. Law Rep. 75.

(d) Aleyn's Rep. 36.

(e) 6 Ell. & Bl. 497.

(f) Buller's Nisi Prius, 53.

(g) 6 Ir. Jur. 279.

(h) 1 Ell. & Bl. 659.

(i) 1 Best & Smith's Rep. 332.

(k) 5 Ir. Com. Law Rep. 538.

E. T. 1862. read it: it is in these words.—[His Lordship read it.]—Taking  
*Common Pleas*  
 CAHILL  
 v.  
 M'DOWALL. that the defendant is indebted to them for so much money retained  
 by him for the use of the wife, without stating anything in the  
 nature of a promise; and now that forms of actions are abolished,  
 this is more properly what, under the old forms would have been an  
 action of debt, than of assumpsit. To this the demurrer has been  
 taken, on the grounds that it is not stated or shown in what right  
 the plaintiffs are suing; nor is it stated or shown how the defendant  
 is indebted to the wife; nor does it appear whether the husband is  
 suing in his own right or in right of his wife; and that such should  
 have been stated in the summons and plaint. We have been  
 referred, during the argument, to several cases in which the wife  
 may join with the husband in actions which accrued during cover-  
 ture. One is the case of a bond made to the wife during her  
 coverture; another, the case of a promissory note passed to her  
 during coverture; in which cases husband and wife may join in the  
 action, or the husband may sue alone.

Mr. *Ryan* has referred us, since the argument, to a recent case  
 in which the wife, with moneys of her husband and her own, pur-  
 chased railway stock, and was registered as the proprietor of it.  
 She afterwards brought an action in her own name to recover  
 dividends which had accrued on the stock, and obtained a verdict.  
 The non-joinder of her husband was not made the subject of a  
 plea in abatement; but the defendant sought to take advantage  
 of it after verdict; the Court, however held, that inasmuch as she  
 might be joined with her husband in an action for dividends against  
 the company, she was entitled to maintain the action in her own  
 name. In answer to these cases, Counsel for the defendant say—  
 it is true a husband and wife may sue in respect of a cause of  
 action which accrued to the wife during coverture; that may be  
 done where she is the meritorious cause of action, and where an  
 express promise to the wife is relied on: but they say that all that  
 must be stated on the face of the summons and plaint, and an express  
 promise laid, to entitle them to maintain the action; and in support

of that proposition the case of *Abbot and wife v. Blofield* (a) was cited. That was an action of *assumpsit*. The defendant received money by the hands of the plaintiff's wife, and in consideration thereof, promised to pay it to them on a certain day; the breach alleged was non-payment; "the defendant pleaded *non assumpsit*, and it was found for the plaintiff; and defendant moved in "arrest of judgment, that the promise was void, being for the "moneys of the husband and wife; and *ad damnum eorum* cannot "be, for a *feme covert* cannot have goods with her husband: and "although it was objected that it may, for moneys due to the wife "dum sola fuit, or for rent during the coverture, it was held that "it shall not be so intended without it had been shown; whereupon "it was adjudged for the defendants." Accordingly, although the plaintiff obtained a verdict, and everything after verdict should be assumed in favor of it, yet the statement there was held insufficient to support it. There is another case to the same effect of *Buckley v. Collier* (b). There baron and feme declared that defendant being indebted to them for work done by the wife in making him a peruke, he promised to pay; to this there was a frivolous plea, to which plaintiff demurred; plaintiff cited 3 *Cro.*, p. 205; 3 *Cro.*, pp. 61, 96; 1 *Cro.*, 438; but relied principally upon *Burchet's case*: the Court however, said, "*Burchet's case* "differs; there was an express promise to the wife, and to that "the husband assented by bringing an action thereupon; but here "is no express promise laid to the wife, here is nothing but "a promise in law, and that must be to the husband, who must "have the fruits of his wife's labor, for which he may bring a "*quantum meruit*." It is decided in that case that there must be an express promise to the wife, even though it appear that she was the meritorious cause of action.

There is also a case of *Bidgood v. Way and wife*, in the Exchequer Chamber, reported in 2 *Sir Wm. Blackstone*, p. 1236. Way and wife brought an action against Bidgood, in the King's Bench, and declared for the occupation of a messuage and lands, at Tiverton, and for money had and received, to the use of Way and wife, on which was founded the *assumpsit* to Way and wife; judgment by

(a) *Cro. Jac.* 644.(b) 1 *Salk.* 114.

E. T. 1862.  
Common Pleas.  
CAHILL  
v.  
M'DOWALL.

E. T. 1862.

*Common Pleas*

CAHILL

v.

M'DOWALL.

default, writ of inquiry, and final judgment for £5. 4s. damages, and £9. 16s. costs. Defendant Bidgood brought a writ of error.

The argument of Counsel was to the same effect as the argument addressed to us. Skynner, C. B., in delivering the judgment of the Court, stated :—" It has been insisted that the Court may intend the "estate in question to have been the wife's; but there can be no "intendment contrary to the plain meaning of the words: besides, "these are general damages; and the count for money had and "received cannot be supported by intendment. In *Abbot v. Blofield*, as reported by *Rolle*, an express promise is stated to the "wife." We cannot possibly distinguish the present case from those that I have referred to; and therefore we are of opinion that the wife has been improperly joined as plaintiff in the present action, the cause of action appearing to be valid in the husband alone.

But then it has been argued that, in consequence of the provisions of the Common Law Procedure Act, no case of misjoinder can be taken advantage of by demurrer. We have been referred to the 84th and following sections of that Act: the words of the 84th section are:—" No plea in abatement, for the non-joinder of any "person as a party, plaintiff or defendant, shall be filed without the "leave of the Court; but such defect, as the misjoinder or non-joinder of any party, may be pointed out by either party, by "notice before the trial; and such notice may be followed by a "summary application to the Court, or to a Judge, in respect "thereof; upon which application the said Court, or a Judge, "may make such order therein, and touching the costs thereof, "as shall seem to be just." The 85th section enacts that "It shall "be lawful for the Court or a Judge, at any time before the trial, to "order that any person or persons, not joined as plaintiff or plaintiffs in the action, shall be so joined; or that any person originally "joined as plaintiff shall be struck out of the pleadings in the "action, if it shall appear to such Court or Judge that injustice "will not be done by such amendment;" &c. The 86th section provides for amendments at the trial in the case of the misjoinder or non-joinder of parties; and the 87th section is to the same effect, carrying out the provisions of the previous sections. It occurs to us however that these provisions apply only where the pleading is

correct upon the face of it,—where the defect does not appear on the pleading, but only by the evidence at the trial. Such is the class of cases to which these sections of the Common Law Procedure Act apply; but not a case in which, upon the face of the pleadings, one of the plaintiffs appears to be unconnected with the cause of action. The English Common Law Procedure Act of 1860, on the same subject, section 19, enacts “that the joinder of “too many plaintiffs shall not be fatal; but every action may be “brought in the name of all the persons in whom the legal right “may be supposed to exist; and judgment may be given in favor “of the plaintiffs by whom the action is brought, or of one or more “of them; or, in case of any question of non-joinder being raised, “then in favor of such one or more of them as shall be adjudged “by the Court as entitled to recover.” It was open to considerable argument that that was a more extensive enactment than the one here; and that the Court should not permit the objection of misjoinder to be taken by demurrer. In the last number of the *Queen's Bench Reports*, at page 333, that very question arose, in the case of *Bellingham v. Clark*. The declaration alleged that A, administrator of B, and one C, sued D, for money paid to D by C and B in his lifetime, and for money lent, &c.; the defendant demurred, alleging for grounds, that there could be no such causes of action as those stated in the declaration, in which the administrator of a deceased partner could sue, jointly with the surviving partner suing in his own right. The Counsel opposed to that demurrer took the same course as was taken here. The Common Law Procedure Act was referred to, and it was contended that, although the grounds alleged might have been a good cause of demurrer before that Act was passed, they could not be so held now. The Court allowed the demurrer, holding that where the misjoinder appeared on the face of the pleadings, the defendant might take advantage of it by demurrer.

We are of opinion that the Common Law Procedure Act here should receive the same construction. Our rule therefore will be, to allow plaintiff to amend, by striking out the wife as co-plaintiff, or by showing her interest in the subject matter of the action, on payment of the costs of the demurrer; or, in default of so doing, judgment for the defendant.

E. T. 1862.  
*Common Pleas.*  
 CAHILL  
 v.  
 M'DOWALL.

E. T. 1862.

Common Pleas

## MURPHY v. KELLETT.

May 13.

**ACTION** for oral slander.—The summons and plaint alleged that, previously to the time of the speaking and publishing of the words, the plaintiff carried on his trade and business as a wine merchant, at Naas, and had, in that capacity, furnished to the poor-law guardians of the Union of Naas, a proposal and tender, to the effect that the plaintiff would contract with the said guardians to supply to them the article of wine of a certain quality, as per sample, and in certain large quantities, and at a certain price; that plaintiff, before the speaking and publishing aforesaid, had furnished to the said guardians a certain small quantity of wine of the plaintiff, as a sample of the quality and description of the wine which the plaintiff so proposed to supply to the said guardians, at the price aforesaid; and at the time of the speaking and publishing aforesaid, the said proposal and tender of the plaintiff, and his guardians, the defendant spoke and published of him, and of him in his trade and business of a wine merchant, these words—"No matter what price is given for wine in Naas, it will be South African sherry." (Meaning that if the proposal of the plaintiff for the supply of wine to the guardians should be accepted, he would, in performance of his part of the contract, supply a wine different from the sample, and of worse quality and price than as shown). The defendant pleaded, in addition to other pleas, that, before and at the time of the speaking of the words, he was a paid medical officer of the poor-law union of Naas, and, as such, it was part of his duty to see that the wines and spirits provided by the guardians for the use of the hospital should be good and proper for that purpose; and that it was also part of his duty to report to the guardians the probable quantities which would be likely to be required and used by him, and to express to the guardians the views and opinions of the suitability of the several qualities and descriptions of wines provided, or to be provided, for such purposes, as well as to inform the guardians if any of the wines and spirits so provided by them for such purpose were bad or unsuitable in quality, or otherwise; and the defendant averred that, before the speaking of the words, proposals for the supplying of the workhouse with wine and spirits had been advertised for in the public newspapers; and that the plaintiff had sent in a proposal for the supplying of wine; and that, at the time of the speaking of the words, the proposals were under the consideration of the guardians, and that the defendant, as such medical officer, and in the discharge of his duty, attended, and that he spoke the words *bona fide* and honestly in the discharge of his duty, and without malice, and that, at the time he so spoke and published the words, he believed them to be perfectly true in substance and in fact.—*Held*, on demurrer, to be a good plea of privilege, inasmuch as it set forth an occasion which warranted the interference of the defendant, and contained averments that he acted without malice, and that he spoke the words believing them to be true.

said sample of wine as aforesaid were in the possession of the said guardians, and under their consideration; and the defendant then well knew the terms of the said proposal and tender, and the effect and meaning thereof, as aforesaid, and had seen the said sample; and the defendant thereupon falsely and maliciously spoke and published, of and concerning the plaintiff, and of and concerning him in his trade and business of a wine merchant, as aforesaid, and in the matter of the said proposal and tender, the words following, that is to say, "No matter what price is given for wine in Naas, it will be South African sherry;" thereby meaning that, if the said tender and proposal of the plaintiff for the supply of wine to the said guardians should be accepted by them, he the plaintiff, as in performance on his part of the said contract, would supply a wine different from the said sample, and of worse quality and price than as shown: whereby, and by reason of the speaking, &c. There were three other counts in respect of the foregoing cause of action; and three further counts for the speaking of other words, but upon the same occasion, and similarly laid in the plaint, and similarly pleaded to.

The defendant, in addition to the usual defences by way of traverse, pleaded, to the first four counts of the plaint, that, before and at the time of the speaking and publishing of said words, in manner and form as in said four first causes of action respectively stated and set forth, he the defendant was a paid medical officer of the poor-law union of Naas, in the county of Kildare; and that, as such, it was part of his duty to see and ascertain that the wines and spirits provided by the guardians of said union, for the use of the hospitals of said union, should be good and proper for that purpose. And it was also part of his duty to report to said guardians the probable quantities thereof which would be likely to be required and used by him, or by his directions, or otherwise, for hospital purposes, in said union workhouse, and to express to said guardians the views and opinions of and concerning the fitness and suitableness of the several qualities and descriptions of wines and spirits provided, or to be provided, by said guardians for such purposes as aforesaid, as well as to inform

E. T. 1862.  
*Common Pleas*  
 MURPHY  
 v.  
 KELLETT.



E. T. 1862.  
*Common Pleas.*

MURPHY  
v.

KELLETT.

said guardians, if any of the said wines and spirits so provided by them for such purpose were bad, or unsuitable in quality, or otherwise, for such purposes. And the defendant averred that, shortly before the speaking and publishing of said words as in said four several causes of action respectively alleged and set forth, tenders and proposals for the supplying of said union workhouse with various articles, including wine and spirits, were duly advertised for in the public newspapers, and otherwise; and that the plaintiff did, as in the first cause of action alleged, send into said guardians a certain proposal or tender for the supplying of wine to said guardians, for the use of said union workhouse; and which wine the defendant said was so required by said guardians for the use of the hospitals of said workhouse, and for the said and other purposes connected therewith, and with said union; and the defendant averred that, at the time of the speaking and publishing of the words, as in said first four causes of action alleged, the subject-matter of said tenders and proposals were under the consideration of said guardians of said union workhouse; and that he the defendant, as such medical officer of said union workhouse, and in the discharge of his duty, attended certain meetings of the board of guardians then assembled in said workhouse, for the purpose, amongst other matters, of considering the subject-matter of said tenders; and that he so then attended said guardians in his said official capacity of medical doctor of said union workhouse, as well for the purpose of answering all such questions as might be asked of him by said guardians, touching and concerning such tenders for wine or spirits, as for the purpose of expressing his the defendant's own opinion as to the fitness and suitableness, or otherwise, of the said wines or spirits which the guardians had then ordered, or were then about to order or accept, for the use of the said union workhouse, and for the purposes aforesaid; and the defendant averred that he did then and there, on said occasion, and in the presence and hearing of said guardians, and in the discharge of his said duty, as such medical officer of said union workhouse, and for the purposes aforesaid, express his opinion and belief as to the various descriptions

of wines and spirits ordered, or then about to be ordered and received by said guardians, amongst other purposes, for the use of the hospitals of said union workhouse; and as to their quality and suitableness, or otherwise, for the purposes for which they were so required in and for the said union workhouse; and, in doing so, and in the discharge of his said duty, he the defendant spoke and published the said words, in manner and form as in said first four causes of action respectively alleged and set forth; and that he spoke and published same, *bona fide* and honestly in the discharge of his said duty, and without malice, and not otherwise; and that, at the time he so spoke and published same, he *bona fide* and honestly believed same to be respectively true in substance and in fact, and which was the speaking and publishing in each of said first four causes of action respectively complained of; and the defendant further averred that, the speaking and publishing thereof respectively was a privileged communication; and that said words were so spoken and published on a privileged occasion.

E. T. 1862.  
Common Pleas  
MURPHY  
v.  
KELLETT.

Demurrer, upon the following grounds, viz. :—

First—That the duties of the defendant, as medical officer, as set forth in the several defences demurred to, were not such as to justify, in law, the speaking and publishing of the words complained of.

Secondly—That the duties aforesaid, as so set forth, were not such as to justify, in law, the speaking and publishing of words having the defamatory meanings respectively alleged.

Thirdly—That the duties, as so set forth, did not legally justify the speaking and publishing of words pointed to the manner in which the plaintiff would, or might thereafter, perform the terms of his then proposal.

Fourthly—That the defences did not show facts sufficient to establish the existence of the duties relied on in the justification.

Fifthly—That the defences did not show that any questions were asked of the defendant, by the guardians, to warrant the defendant's expression of opinion in the premises.

Sixthly—That the defences did not show facts to justify the use of the words by defendant, in discharge of his duty as medical officer.

E. T. 1862.

*Common Pleas*MURPHY  
v.

KELLETT.

Seventhly—That the defences did not show how it was the duty of defendant to advise the guardians as to the honesty of purpose in any person making tenders, or the probability of the proposed contracts being faithfully performed.

Eighthly—That the defences did not aver facts sufficient to justify the use of the words concerning the plaintiff, or concerning him in his trade, or in the matter of his proposal or tender.

Ninthly—That the defences did not aver facts sufficient to show either a privileged occasion or privileged communication.

*Phillips* (with whom was *Hemphill*), in support of the demurrer.

No duty, sufficient to justify the speaking of the words complained of, is alleged in this defence; nor is the interest of the defendant, in the subject matter of the discussion by the guardians, sufficiently shown to warrant his interference. The plea ought to show the facts which constituted the belief in the defendant's mind. The precedents in the books are opposed to the mode of pleading adopted in this defence. The following cases were cited:—*Chitty on Pleading*, 5th ed., 1st vol., p. 532, 3rd vol., p. 1036; *Ede v. Scott* (a); *Cooper v. Lawson* (b); *Flint v. Pike* (c); *Bell v. Park* (d); *Dixon v. Franks* (e); *Pierce v. Ellis* (f); *Gilpin v. Fowler* (g); *Praeger v. Shaw* (h); *Owens v. Roberts* (i); *Atkinson v. Congreve* (k); *Martin v. Strong* (l).

*Sidney* and Serjeant *Armstrong*, contra.

The grounds on which to justify in a defence are well defined in *Harrison v. Bush* (m).

The essential matters to be shown in a plea of privilege are three:

First—An occasion sufficient *prima facie* to justify the speaking of the words.

(a) 7 Ir. Com. Law Rep. 607.

(c) 4 B. & C. 473.

(e) 7 Ir. Jur. 239.

(g) 9 Ex. 615.

(i) 6 Ir. Com. Law Rep. 386.

(l) 5 Ad. & El. 535.

(b) 8 Ad. & El. 746.

(d) 10 Ir. Com. Law Rep. 279.

(f) 6 Ir. Com. Law Rep. 55.

(h) 4 Ir. Com. Law Rep. 660.

(k) 7 Ir. Com. Law Rep. 109.

(m) 5 El. & Bl. 344.

Secondly—That the defendant spoke the words, believing them to be true. E. T. 1862.  
*Common Pleas.*

Thirdly—An averment of the absence of malice.

The pleas here contain these three elements, and that ought to be sufficient. The position of the defendant imposed upon him certain duties to be observed by him. His duties, as medical officer of a union, are defined in *Moore's Compendium*, p. 674; he had, from the obligation upon him, an interest in the inquiry; and if that were stated in the plea it ought to be enough. The case of *Bell v. Park* shows that duty ought to be averred. They cited *Seymour v. Maddock* (a); *Somerville v. Hawkins* (b); *Smith v. Thomas* (c). MURPHY  
v.  
KELLETT.

*Hemphill* was heard in reply.

MONAHAN, C. J.

We are of opinion that the demurrer in this case must be overruled. From the very nature of the defendant's employment, as medical officer in the workhouse, it was both his duty and interest to see that proper wine should be provided for the use of his patients; he was therefore interested in the subject matter of the discussion in the board-room, at which the words complained of were spoken. The occasion would therefore appear to have been privileged. If he spoke in excess of what the occasion required, that is not ground of demurrer, but will be a proper question for the consideration of the jury at the trial of the case. With respect to the other point, whether the defendant should set forth in his plea the grounds of his belief in the statement complained of, we do not think that such is necessary. It will be a matter of evidence, to show the jury that he did not act maliciously, but *bona fide*, believing what he stated to be true; and he will, of course, be obliged to show the grounds of his statement. We are of opinion that the three essential parts of a plea of privilege are contained in the one before us; first, an occasion warranting the interference of the defendant; secondly, an averment that he acted without malice; and thirdly, that he spoke the words *bona fide*, believing them to be true.

(a) 16 Q. B. Rep. 326.

(b) 10 C. B. Rep. 583.

(c) 2 Scott, 546.

M. T. 1862.  
*Common Pleas*

## FOSBERRY

v.

## THE WATERFORD AND LIMERICK RAILWAY CO.

Nov. 21.

A railway company, in constructing their line of railway across a public road, lowered a portion of the surface of the road, in order to give the railway bridge the legal height, and to have the proper ascent and descent on the road. The portion so lowered was not used by the company, but, having become worn by the public traffic, it was sought to make the company liable, under the 46th section of the 8 Vic., c. 20, for its repairs—*Held*, that there was no obligation on the company to keep in repair the portion of the road in question, not being an approach to the bridge, within the meaning of that section.

THIS case came before the Court on a case stated by certain Magistrates for the county of Limerick, at a Petty Sessions, held at Limerick, on the 30th of October 1862. The defendants were summoned by Mr. Fosberry, who is the county surveyor for the eastern division of the county of Limerick, for having failed to put into proper repair, contrary to the provisions of the 8 Vic., c. 20, twenty-eight perches, or thereabouts, of the public road from Bruff to Castle-connell; the same being a portion of the road on which a descent was made by the company, for the purpose of carrying it under their railway-bridge at Peafield, in said county, notwithstanding ten days' notice from complainant that the said portion of the road was out of repair. The ten days' notice referred to in the summons and plaint was proved to have been served on the defendants; and it was also proved that the surface of the road was out of repair; and the only question submitted to the Court to determine was, were the defendants, under the circumstances, liable to maintain and keep in repair for ever the portion of the surface of the road in question? The Magistrates dismissed the case, being of opinion that the company was not liable. In the case submitted by the Magistrates, it was stated that the company had lowered or cut away the portion of the road mentioned in the summons, and that it was the surface of the portion so lowered by the company, but which was not used by them, which had become worn and cut down, and which the company were asked to put into repair; that it was contended they were bound to do so, under the words of the 46th and 49th sections of the 8 Vic., c. 20. That the liability of the company to maintain and keep in repair the surface of a road lowered by them

for the purpose of carrying their railway over such road, was the same as in the case of the road being carried over the railway, the surface of which, it was said, railway companies were bound to maintain and keep in repair, by two decisions of the Court of Queen's Bench and Exchequer in England. It was also stated that it was proved, by the contractor for the road in question, that the company had sunk the road to the depth of twelve feet at the place where the arch of the bridge crossed the road, and that they had paid him for several years for keeping that portion of the road in repair. That the portion of the road over which the lowering or sinking extended, that is, from the point where it began on one side of the bridge, to the place where it ended on the other, was as obvious and as easily defined as where, in the case of the road being carried over the railway, the ascent or rise in the road begins at one side, and ends at the other. That it was admitted by the same witness that the railway-bridge, with the immediate approaches thereto, and all the works connected therewith, were then and always in proper repair; and that the part complained of as being out of repair was merely the surface of the road. That the defendants had lowered or cut away the road, pursuant to the provisions of the Act of Parliament enabling them to do so; and that it was the public traffic on the road, and not the railway company or its traffic, which wore it down, and caused it to require to be repaired by metal-ling. The case further stated the arguments of the respective parties at Sessions, and the decision of the Magistrates.

M. T. 1862.  
*Common Pleas*  
**FOSBERRY**  
**v.**  
**WATERFORD**  
**AND**  
**LIMERICK**  
**RAILWAY.**

*J. Clarke* (with whom was *J. Murphy*), on behalf of the complainant.

The 46th section applies to the approaches to a bridge which goes over a railway: it provides for their being maintained at the expense of the company: *North Staffordshire Railway Company v. Dale* (a); *Leech v. North Staffordshire Railway Co.* (b). There are two modes specifically provided for by the Act. The railway company adopted one of them, by making the road to

(a) 8 EL. & BL. 836.

(b) 5 H. & N. 160; S. C., 29 Law Jour. Rep., Mag. Cas., 50.

M. T. 1862. *pass under the railway. The road has been necessarily sunk very*  
*Common Pleas.* much, to give headway. The effect was injurious to the road.  
 FOSBERRY If what was done was a work within the meaning of the Act,  
 v. WATERFORD the company are bound to maintain it; they are bound to repair  
 AND the approaches to, and road over, a bridge. The cuttings were  
 LIMERICK necessary works connected with the bridge; the company was  
 RAILWAY. therefore bound to make the repairs. The Court of Queen's Bench,  
 in the *Waterford and Limerick Railway Company v. Kearney (a)*,  
 were not unanimous; this Court ought not therefore to be bound  
 by that decision.

*C. R. Barry and Jellett, contra.*

Unless this Court be satisfied, to a degree of certainty, that the decision of the Queen's Bench was erroneous, they will not overrule it. The case of *Coyne v. Brady (b)* is an authority for that. It would be important to be guided by the practice in England upon this question. The arguments and decisions in England have respect to roads passing over the railway; but none to the case of a road passing under a railway. The terms of the 46th section are inapplicable to the present case: this is a case provided for by the 53rd and following sections.

*J. Murphy, in reply.*

The cases in England equally apply to the case of a railway being constructed over or under a road. The 46th section includes both class of cases. The decision in the *North Staffordshire Railway Company v. Dale* ought to be favorable to the appellant's case. The road was clearly "a necessary work" connected with the bridge, which ought to be repaired and maintained by the company.

*Cur. ad. vult.*

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MONAHAN, C. J.

Nov. 21.

This case comes before us on a case settled by Magistrates at Petty Sessions, for our decision. The facts of the case are,

(a) 12 Ir. Com. Law Rep. 224.

(b) 12 Ir. Com. Law Rep. 577.

identical with those of *Kearney v. The Waterford and Limerick Railway Company*, reported in 12 *Ir. Com. Law Rep.*, p. 224, in which two of the Judges of the Queen's Bench (Justices O'Brien and Fitzgerald) decided in favor of the railway company, Mr. Justice Hayes differing from them; my Lord Chief Justice being absent. From the nature of the case, there could be no appeal from the decision of the Queen's Bench in that case; nor can there from our decision in the present, which the Magistrates have been induced to state expressly, for the purpose of re-agitating before this Court the questions so decided by the Court of Queen's Bench. The practice in such cases is quite settled. If the case was one in which there could be an appeal from our decision, we should follow the decision of the Queen's Bench, a Court of co-ordinate jurisdiction; leaving the party dissatisfied with our judgment to have it reviewed in a Court of Appeal; but, as this is not practicable, we are not bound by the decisions of the other Court, but must consider the case on its merits; and though we are of course bound to pay every respect to the decision of another Court, still if, on consideration, we come to the conclusion that that judgment is erroneous, we are bound to give the suitor the benefit of our opinion, and decide according to our own judgment. It therefore becomes necessary to state shortly the facts of the case. The railway company, in the construction of their line, had to cross a public high-road by means of a bridge, on which the railway line was made; and in order to comply with the provisions of the 49th section of the 8 *Vic.*, c. 20, it became necessary for them to sink or lower the surface of the high road immediately under the bridge, and to slope it for some distance at either side. It is admitted that the company having done so, put this portion of the road in perfect repair, and restored it to the public. The road has since been out of repair, not from any act of the railway company, but in consequence of the ordinary public traffic passing along it, just as the other portions of the road were; and the question for our consideration is, whether the portion of the road immediately under the railway bridge, and up to the commencement of the slope or

M. T. 1862.  
Common Pleas  
FOSBERRY  
v.  
WATERFORD  
AND  
LIMERICK  
RAILWAY.



M. T. 1862.  
*Common Pleas*

FOSBERRY  
v.

WATERFORD  
AND  
LIMERICK  
RAILWAY.

ascent and descent at either side is to be kept in repair by the railway company, or by the public, by means of the ordinary grand jury presentment? Mr. Fosberry, in the case before us, represents the county grand jury, or contractor for the repair of the other portions of the road; and he by his Counsel insists that, under the provisions of the 46th section of the Act referred to, the railway company are bound to keep in repair the portions of the road I have mentioned. By that section it is enacted as follows:—"If the line of the railway cross any turnpike-road or "public highway, then (except where otherwise provided by the "special Act) either such road shall be carried over the railway, "or the railway shall be carried over such road by means of a "bridge, of the height and width, and with the ascent or descent, "by this or in the special Act in that behalf provided; and such "bridge, with the immediate approaches, and all the necessary "works connected therewith, shall be executed, and at all times "thereafter maintained, at the expense of the company."

He contends that the words "And such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company," oblige the company, in the present case, to maintain the portion of the road passing under the bridge, and also the portion thereof which has been sunk or lowered by the company, for the purpose of enabling them to have their bridge at the proper height above the road; and we have been referred to the cases of the *North Staffordshire Railway Company*, in 8 *Ellis and Blackburne*, and 5th *Exchequer Reports, N. S.*, in which the Courts of Queen's Bench and Exchequer, at Westminster, held that in case of a public road being carried over a railway, by means of a bridge, the company, by the 46th section of the Act referred to, were bound to keep, not merely the bridge, but the road on the surface thereof, and the approaches thereto, from the commencement of the ascent on the one side, to the end of the descent on the other, in repair; the Courts holding that the surface road was a portion of the bridge, and the approaches thereto: and some casual expressions of the Judges have been referred to, from which it is

sought to be collected that, in their opinion, the company was bound to keep the road in repair, not only in the case before them, in which the public road was carried over the railway, but also in cases like the present, in which the railway is carried over the public road. With respect to these cases, it is enough to say that the present case was not at all before those Courts. Any observations made on the subject were completely extrajudicial; and therefore we are obliged to consider the clause of the Act relied on by the parties. I shall first consider the case in which the railway is carried over the road by a bridge, at such a height that no alteration is made in the road, by sinking or otherwise, but where the bridge is built over the road, and the scaffolding and building materials removed. The road is precisely in the state it was before the bridge was built, with the exception that it is crossed by a railway bridge. Now, in such a case as this, it appears to me impossible to hold that such a road is part of the bridge or the approaches thereto, or the necessary works connected therewith. I cannot consider a road or river, crossed or spanned by a bridge, part of the approaches thereto or the works connected therewith, within the 46th section of the Act. In the case I have suggested, no alteration whatever is made in any part of the road; and it would seem altogether unreasonable to throw the repair of it on the railway company. But it has been argued that the case is altogether different when, for the purpose of building the bridge of the proper height, the surface of the road under it has been lowered or sunk; that then the lowered or sunken road, though not a portion of the bridge or the approaches thereto, still becomes one of the necessary works connected therewith, which, under the section referred to, the company are bound to maintain at all times thereafter. I confess I cannot see, that when once the sunken road is completed and made fit for traffic, that it is, in the sense of the Act, a necessary work connected with the bridge, to be kept in repair and maintained by the company. But then the question arises, what is the liability of the railway company, in case, for the purpose of carrying their railway over a public road, by means of a bridge or otherwise, it becomes necessary for them to sink or lower

M. T. 1862.

*Common Pleas*

FOSBERRY

v.

WATERFORD

AND

LIMERICK

RAILWAY.

M. T. 1862.  
*Common Pleas*  
 FOSBERRY  
 v.

WATERFORD  
 AND  
 LIMERICK  
 RAILWAY.

the public road? My answer is, the liability is determined by the 53rd and 56th sections of the Act. By the 53rd section it is expressly provided that in case the company shall find it "necessary to cross, cut through, raise, sink, or use any part of any road, the company shall, before the commencement of their operations, cause a sufficient road to be made instead of the road to be interfered with; and shall, at their own expense, maintain such substituted road in a state as convenient for passengers as the road so interfered with, or as nearly so as may be;" and by the 56th section it is provided that "If the road so interfered with (i. e., by cutting or sinking) can be restored, compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time it was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored, compatibly with the formation and use of the railway, the company shall cause the new or substituted road to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into the required condition, within the period particularly stated therein;" and by the 57th section the company is rendered liable to certain penalties if they do not restore the old or substituted road in the required condition, within the specified times. May I ask, if the railway company, for the purpose of crossing a public road or the surface thereof, had occasion to sink or deepen the public road, can any one doubt but that the liability of the company is such as is defined by this 56th section? And, when the requisites of this section are once complied with, in the case I have supposed, of a level crossing, what pretence is there for saying that the company is responsible for maintaining the road so used and sunk? And, on principle, what difference can it make whether the road is sunk to be crossed by a bridge or in any other way? And, in the case of crossing a public road by a bridge, can anyone doubt that, in such a case, the company would be bound, at all events, under the 53rd section, to provide a substituted road before the commencement of their operations; and if so, and the

53rd section at all applies to the case, on what principle, and for what reasons can we hold that we are to stop short, and say that the 56th section does not equally apply? The words of both sections are general, not confined to any particular cases, but to all cases in which it is necessary to sink or deepen a public road. What right have we to say that these sections do not apply to the case of lowering or sinking a road, to be crossed by the railway bridge? The words are general; and there seems to be no reason why they should not extend to the case of a road crossed by a railway bridge as well as to all other cases. I am quite aware that, under the 49th section of the Act, the road passing under the railway bridge must have the ascent and descent thereby provided, and the bridge must be of a specified height over the road; and, no doubt, if, from any defect in the construction of the bridge, it should sink, so as not to leave the required space between the bridge and the road, I entertain no doubt but that the company would be obliged to raise their bridge, or execute whatever works might be necessary to give to the public the required space. And probably if, by any sudden and unusual convulsion of nature, the road should rise, it might perhaps be held that there was some obligation on the company to restore the road to its original condition; but I do not think it necessary to enter into the consideration of such a question. It seems to me it will be time enough to consider such a question, when the very improbable event occurs. But, in the present case, the road having kept its proper distance from the bridge, and being out of repair, not from any act of the company, but of the ordinary traffic of the public passing along it, we are all of opinion that there is no obligation on the company to put it now into repair.

Our opinion therefore is, that the decision come by the majority of the Court of Queen's Bench is right, and should be followed by us.

BALL and KEOGH, JJ., concurred.

CHRISTIAN, J.

Although I agree that the question which is put to us in this case should be answered as the same question was answered by the

M. T. 1862.  
*Common Pleas*

FOSBERRY  
v  
WATERFORD  
AND  
LIMERICK  
RAILWAY.

M. T. 1862.  
Common Pleas

FOSBERRY  
v.

WATERFORD  
AND  
LIMERICK  
RAILWAY.

Court of Queen's Bench in *Kearney v. The Waterford and Limerick Railway Company*, still I cannot go along with much of the reasoning of the learned Judges who formed the majority upon that occasion.

It appears to have been assumed in the Queen's Bench (and indeed throughout the argument here also), that if once it could be shown that cases of this kind were included under the provisions of one of the two classes of sections which were so often referred to, they were, for that reason alone, necessarily excluded from the other. But, in the view which I take, both those classes of sections are applicable to the subject, that is, each applies at a different stage of the railway works.

I shall state, in the first instance, the way in which I conceive that the 46th and 49th sections apply in such cases, *i. e.*, in cases in which a railway is carried on a bridge over a highway. If, in constructing the railway bridge, it was found necessary to interfere with the level of the road below, *i. e.*, if the legal elevation could be, and was, got without excavating the road below, then in my opinion those sections have no application, and the case is governed by the 53rd and following sections. But if, when the bridge was being constructed, it was found that the elevation required by the 46th and 49th sections could not be obtained without sinking the level of the road below, in such a case I am of opinion that the excavation or cutting required for that purpose was, in the language of the 46th section, "a necessary work connected with the bridge," and must therefore "be executed, and at all times thereafter maintained, at the expense of the company." I am quite unable to discover in what single particular it is, that that operation fails to satisfy every term of the statutable definition. It "is necessary," inasmuch as the bridge could not have been made conformable to law without it; it is "connected therewith,"—that speaks for itself. But it was argued it is not "*a work*." Why is it not a "*work*"? Why is not a cutting which must range over a considerable length of road, which in terms of the statute may be in depth one foot in every sixteen, which is commanded by the Act to be done as an essen-

tial part and parcel of the construction of a railway bridge, why is not this a work? Is not a cutting as much a work as an embankment or a bit of masonry? It is useless to pursue this further, because if it be not plain to the understanding on the bare reading of the words of the statute, no amount of ratiocination can make it so. I therefore concur with Mr. Justice Hayes in thinking that the lowering or cutting away of the road, which the case expressly states was done by the company, for the purpose of giving the bridge the necessary legal height, was a "necessary work connected therewith," and was therefore, one which the company were bound "to execute," and are now bound "at all times to maintain" at their own expense.

But then comes the question, what is it that they are then bound to execute and to maintain? And here it is that I begin to differ with Mr. Justice Hayes. I say it is only that which is "necessary to and connected with" the bridge above. But what is that? Simply the depression of the road which is necessary for giving to the bridge its legal height. But it is by no means necessary for the bridge that the surface of the road thus deepened shall be in such a state of repair as to be convenient for travellers. That is utterly immaterial to the bridge, and I am of opinion that the 46th section imposes no such obligation on the company. But Mr. *Murphy* relied on the language of Lord Campbell, in the *North Staffordshire Railway Company v. Dale* (a), as an authority to show that, when there is an obligation to maintain a road, it is not satisfied until the road is made fit for travellers. He says:—"The obligation is not discharged by merely putting "arches: the work must be complete so as to be fit for the "passage of carriages. Till then the Act is not complied with." That is perfectly accurate, as applied to the case Lord Campbell was dealing with, namely, that of a high-road carried over a railway; but is obviously inapplicable to the case we have to deal with, where the highway in question passes *under* the railway. The former case is governed by words in the 46th section, which do

M. T. 1862.  
Common Pleas  
FOSBERRY  
v  
WATERFORD  
AND  
LIMERICK  
RAILWAY.

(a) 8 El. & Bl. 836.

M. T. 1862.  
*Common Pleas*  
 FOSBERRY  
 v  
 WATERFORD  
 AND  
 LIMERICK  
 RAILWAY.

not apply at all to the latter. "*The bridge, with the immediate approaches,*" shall be executed and maintained. And what the English cases decide is, that in the case of a bridge which carries a road over the railway, the road is a part of the bridge; and when the Act imposes on the company the duty of executing and maintaining the bridge and its approaches, it necessarily includes the road which is part of the bridge, and obliges them to maintain it and its approaches, *quod* road and *quod* approaches, that is, in a state fit to be used as such by travellers. But all this is inapplicable where it is the railway which is carried over the bridge. The high-road below is neither a part of the bridge, nor (in my opinion, equally clearly) an approach to the bridge. Here, to bring the case within the 46th section, there is nothing to go upon but the words "necessary works connected therewith." But as I have observed already, the only view in which the operations upon the road below are necessary to or connected with the bridge, is simply the maintaining the necessary amount of depression; the state of repairs of the surface so depressed is quite immaterial to the bridge. I am therefore of opinion, that although the 46th section did apply to the original making of the necessary depression in the road, and does apply to the maintaining of it, it has no application to the state of facts found by this case, which is that of simple superficial disrepair not prejudicial in any way to the legal status of the bridge.

But then arises this question: the company having, in the exercise of their powers broken up the surface of this road, were they at liberty to leave it so? Clearly not, but in my opinion it was the 53rd and following sections, especially the 56th, and not the 46th, which imposed on them the duty of restoring it. But that duty was occasional only; unlike those created by the 46th section, which are perpetual: and when once the company have, in the language of the 56th section, "restored the road to as good a condition as the same was in when it was first interfered with, "or as near thereto as circumstances will allow," (*i. e.*, as nearly as can be done consistently with the maintaining the necessary depression), they have nothing further to do with the mere repairs of the

road; which are thenceforth remitted to those whose duty it was to make them before the company interfered. If, however, it should happen to become necessary for the company at any future time again to put in action their powers under the Act, and in so doing again to interfere with the road, for example, if in process of time the excavation of the road began to fill up, so that the bridge no longer had the elevation required by law, then, and so often as it might so happen, if I be right in holding that that excavation was "a necessary work connected with the bridge," within the meaning of the 46th section, the company would be bound under that section to restore the excavation; and as, in so doing, they must necessarily break up the surface of some part of the road, they would thereupon again come under the obligation of the 56th section, and be bound to restore it, and so *toties quoties*. The result is that, according to my understanding of the Act, as applied to the facts of this case, the only obligation which the 46th section now imposes on the company in connection with this road is, that of maintaining always that depression of it which is necessary to give the required elevation to the bridge, and that the only obligation which the 56th section imposes on them is, to make good any damage which may be done in fulfilling the former obligation; but the present case, which is one of disrepair, not occasioned by any act of the company, or impairing in any degree the legal conditions of the bridge, but caused merely by the wear and tear of ordinary traffic, does not fall within the provisions of either the one section or the other, and consequently the liability to make it good remains where it would have been if the Act had never been passed, or the company had never interfered with the road.

Judgment for the defendants.

M. T. 1862.  
*Common Pleas*  
FOSBERRY  
v  
WATERFORD  
AND  
LIMERICK  
RAILWAY.



T. T. 1862.

Exchequer.

## BEERE v. FLEMING and others.\*

May 30, 31.  
June 5.

(Exchequer.)

To a summons and plaint, containing counts in trespass and trover, for cutting turf upon a bog granted to the defendants by a deed, which reserved the "turbary" to the plaintiffs, an equitable defence was pleaded to this effect; that the very questions raised in this action had been the subject of a bill and cross-bill filed by the ancestors of the parties to this action;

the former to establish an exclusive right to turbary in the ancestor of the plaintiff, under an instrument in writing of the year 1791, the latter praying the execution of a conveyance to the ancestors of the defendants in the terms of the above mentioned instrument; that the ancestor of the plaintiff having brought an action of ejectment for the bog in question, pursuant to decretal order of the Court of Chancery, a verdict was found for the ancestors of the defendants, which the Court, sitting *in Banco* refused to set aside; that in a second action brought by the ancestor of the plaintiff, for preventing him from cutting turf on the bog, he was nonsuited; that the cross-suits having come to a hearing, a decree was pronounced, which remains in minutes "as the parties thereto agreed, and did act on the minutes, and submitted thereto;" that by that decree, the bill of the ancestor of the plaintiff was dismissed with costs, and the ancestors of the defendants were declared entitled to the possession of the bog in question (*inter alia*); that the deed, upon the construction of which the present action was brought, was made in pursuance of that decree, and in the exact terms of the deed of 1791; that the judgments and decrees in the former action and suits were still in force, and that by them, the very questions raised by the first paragraph of the summons and plaint had been decided.—*Demurrer thereto allowed*, upon the ground that the dismissal of a bill, seeking equitable relief in respect of an instrument on which a party can sue at law, is no bar to an action at law upon the same instrument, although the decree do not state the dismissal to have been without prejudice.

*Held*, that there is no repugnancy between a grant of "bog" and a reservation of "turbary," as turves are not the sole profit of bog. And that "turbary," not being the soil, but only a profit *a prendre*, is not within the 3 & 4 W. 4, c. 27.

\* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

“liberty at all times to cut, fell, grub up, raise up, manufacture, and carry away the same; and also to copse in and preserve all woods and underwoods that then were or thereafter might be growing on the said premises; together with full and free liberty at all times to make any roads, causeways, water and watercourses, ditches, drains, or fences, that might be found necessary.” *Habendum* to James and Harloe Fleming, their heirs and assigns, for ever, at the yearly rent of £85, late currency. Having added, that by mesne assignments, the above rent and all rights and privileges, created and reserved by the deed of 1820, were now vested in the plaintiff, the first paragraph of the summons and plaint complained that, the defendants Richard Fleming and Edward Frazer, who were in possession, each of one third, of the lands in question, had by their servants and undertenants “dug up and cut and carried away a large quantity, that is to say 150 kishes, of turf, on and being part of the turf bog on the said lands, so by said indenture of the 22nd of December 1820 granted, and thereby wrongfully interfered with the turbary saved and reserved by the same deed, and which turbary was then as aforesaid lawfully vested in and of right belonged to the plaintiff as his exclusive property.”

T. T. 1862.  
*Exchequer.*  
 BEERE  
 v.  
 FLEMING.

The second paragraph of the summons and plaint treated the reservation in the deed of 1820 as a re-grant to the plaintiff of the turbary.

The third paragraph complained of the injury inflicted upon the plaintiff's exclusive right to turbary, derived by grant from John Taaffe.

There was also a count in trover.

The first defence (stated at length in the judgment of the Court), to the first paragraph of the summons and plaint, was an equitable one, viz., that the effect of the reservation of “turbary,” in a deed of 1791, had been the subject of bill and cross-bill between Taaffe, grantor in the deed of 1820, and members of the Fleming family, the ancestors of James and Harloe Fleming; and that an ejectment for bog, having been brought by Taaffe, pursuant to a decretal order of the Court of Chancery, a verdict was directed for the Flemings in that action; while in an action by Taaffe against them, for pre-

T. T. 1862. *Eschequer.*  
*BEERE*  
*v.*  
 FLEMING. venting him from carrying away turf, he was nonsuited. That upon the matter coming again before the Court of Chancery, Taaffe's bill "was dismissed," and the Flemings were declared entitled to possession of the bog, and a conveyance thereof, upon payment to Taaffe of his costs; that the deed of 1820 was made pursuant to that decree, which, together with all the proceedings in Chancery, it recited; and that these judgments at law, and decrees in equity, were still in full force, and conclusive upon the question in dispute in the present action.

The second defence to the first paragraph of the summons and plaint relied upon the inconsistency between a grant of "bog" (mentioned in the deed of 1791, which the deed of 1820 purported to carry in effect), and a reservation of all turbary.

The third defence to the first paragraph of the summons and plaint relied upon adverse possession of the bog and turbary for twenty years.

To all these defences the plaintiffs demurred, and principally relied upon the following points:—

That it did not appear from the defence that the question raised by this action was already decided; that no estoppel against the plaintiff was shown; that the defence did not show any inconsistency or repugnancy between the grant of the bog and the reservation of all turbary; that the Statute of Limitations did not apply to turbary as being an easement; that the defendants were precluded from setting up any right to the turbary adverse to the plaintiff, whilst holding the bog under the deed of the 22nd of December 1820, and paying rent therefor to the plaintiff.

*W. Smith* and Serjeant *Sullivan*, for the plaintiff, in support of the demurrer.

Bog and turbary are not identical, as the defendants contend; bog means the soil itself; turbary is the right or easement to enter, and cut turf upon bog; when all the turf is cut away, the defendant will have the exclusive possession and use of the soil when denuded of turf. An exclusive right to cut turf may be reserved: *Co. Lit.*,

4 *b*; *Massey v. Gubbins* (a). That exclusive right is the subject of T. T. 1862. grant: *Wilson v. Mackreth* (b). The word "all" in the reservation clause is distributive: *Ewart v. Graham* (c); and is synonymous with "exclusive:" *Boyle v. Olpherts* (d); *Earl Cardigan v. Armistage* (e). As to the plea of the Statute of Limitations, that Act does not apply to exclusively incorporeal hereditaments: 3 & 4 W. 4, c. 27, s. 1; *M'Donnell v. M'Ginty* (f). Nor can any length of user by a tenant give him a right against his landlord: *Bright v. Walker* (g); *Burrowes v. Hayes* (h); *Lord Courtown v. Ward* (i); *Lord Waterford v. Austen* (k).

*Eschequer.*  
BEERE  
v.  
FLEMING.

*R. C. Ince* and *J. E. Walsh*, in support of the defences.

The decree in *Taafe v. Fleming* was rightly pleaded; for the present action is concerned with the same matter as that suit: *Mitford on Pleading*, p. 278. The exception of turbary in a demise of bog is void for repugnancy: 4 *Byth. Conv.*, p. 316; *Dorrell v. Collins* (l); *Horneby v. Clifton* (m); *Vin. Abr.*, tit. *Reservation*, 60. As to the Statute of Limitations, *M'Donnell v. M'Kinty* was a case as to mines, as to the effect of the statute upon a right of entry thereinto.

*Smith v. Lloyd* (n) and *Irons v. Douglas* (o) were also cited.

*Cur. ad. vult.*

FITZGERALD, B., now delivered the judgment of the Court:—

June 5.

In this case, the plaintiff is the assignee of the grantor; and the defendants are each, as to one-third of the lands of Make-nagh, in the county of Sligo, assignees of the grantees in a deed dated the 22nd of December 1820, whereby one John Taafe conveyed to James Fleming and Harloe Fleming in fee, at a

(a) Long. & Town. 88, 99.

(c) 7 Dom. Proc. 331.

(e) 2 B. & C. 197.

(g) 1 C., M. & R. 211.

(i) 1 Sch. & Lef. 8.

(l) Cro. El. 6.

(n) 9 Exch. 562.

(b) 3 Burr. 1824.

(d) Long. & Town. 320.

(f) 10 Ir. Law Rep. 514.

(h) Hay. & Jon. 597.

(k) Jon. 627.

(m) 3 Dyer, 264 b.

(o) 3 Ir. Eq. Rep. 612.

T. T. 1862. rent, all that and those the town and lands of Makenagh, situate  
*Exchequer.* in the county of Sligo, saving and reserving unto the said John  
 BEERE Taaffe his heirs and assigns (*inter alia*), all mines, minerals, tur-  
 v. bary, and soforth; and the plaintiff complains that, since their  
 FLEMING. respective estates so vested in himself and the defendants, the defend-  
 ants have dug and carried away large quantities of turf from the  
 lands granted, and wrongfully interfered with the exclusive right  
 of turbary vested in him by the effect of the foregoing deed.

In the first paragraph, the deed of December 1820 is stated according to its terms; in the second paragraph, it is pleaded as a re-grant, by the grantees therein named, of the turbary to the grantor; and in the third paragraph it is pleaded as a grant of the turbary.

To the first paragraph three defences have been pleaded: the first defence states a deed dated the 3rd of May 1791, whereby one Dundas, in what are substantially the same terms as those in the alleged deed of 1820, conveyed in fee, at the same rent, the same lands, with the same reservation, to one Knott. It further states that Dundas, by deed dated the 24th of March 1810, conveyed all his interest in the lands to John Taaffe, the grantor in the deed of 1820, in fee; that all the interest of Knott under the deed of 1791, who died in June 1815, vested in William Fleming and Judith his wife; but that such interest was not a legal one. That disputes arose between Taaffe and the Flemings, as to the turbary on the lands, in consequence of which, and in consequence of the Flemings having dug and carried away turf, Taaffe, on the 16th of June 1815, filed a bill, complaining against the Flemings, praying, amongst other things, an injunction, to restrain them from cutting, digging or carrying away any of the said turbary; and further praying that, if his exclusive right to the said turbary should be denied or disputed, then that such exclusive right to the turbary might be established in such manner as to the Court should seem fit; and further praying an interim injunction against waste. The defence further states, that the Flemings having filed their answer to the bill, denying the exclusive right of turbary claimed, did further, on the 23rd of

February 1816, file their cross-bill against Taaffe, praying, amongst other things, that Taaffe might be decreed to execute to them a legal conveyance of the lands, pursuant to the deed of 1791, and according to the terms, true intent and meaning thereof; and that the respective rights of the plaintiffs and defendant might be declared by the Court. The defence states that, Taaffe having filed his answer respecting the claim to exclusive turbary, both causes were heard in the month of November 1816; and that, on the 29th of November, a decretal order was pronounced, which however was never made up, but is still in minutes, directing both bills to be retained, with liberty to Taaffe to bring an ejectment or other action, as he might be advised, for recovery of such part or parts of the premises as he claimed to be entitled to; directing the Flemings to take defence; so that the action might be tried at the then next Assizes for the county of Sligo; and that Taaffe should admit on such trial that a legal estate passed under the deed of May 1791. The defence further states that, pursuant to the order, Taaffe brought his ejectment in the Court of King's Bench, to recover possession of part of the said lands, and, *inter alia*, 280 acres of bog; that defence having been taken, the ejectment was duly tried against William Fleming; Judith having died in the meantime: that, at the trial, the Judge directed a verdict for the defendant in the action, on the ground that the soil passed by the deed of May 1791: that the Court of King's Bench, *in banco*, affirmed the ruling of the Judge; and a final judgment was entered for the defendant in Trinity Term 1818. The defence further states that, in the same year (1816), Taaffe brought an action on the case against William Fleming, to recover damages for his having been prevented by the said William Fleming from cutting, saving and carrying away turf from the said lands, and for converting to his own use large quantities of turf on the said lands belonging to Taaffe. That Fleming pleaded to such action the general issue; and that, at the trial, Taaffe was nonsuited, and a judgment of nonsuit was entered in Trinity Term 1817. That William Fleming having died, the Chancery causes were revived by James Fleming and Harloe Fleming, the

T. T. 1862.

*Eschequer.*

BEERE

v.

FLEMING.

T. T. 1862.  
*Eschequer.*  
 BEERE  
 v.  
 FLEMING.

grantees in the deed of 1820, and were finally heard in the month of January 1820. That, on the 28th of January 1820, a decree was pronounced, which however was not made up, but is still in minutes, "as the parties thereto agreed, and did act on the minutes, "and submitted thereto; and the said decree is recited in the deed "of the 22nd of November 1820." That, by such decree, the bill of Taaffe was dismissed with costs; and in the cross-cause the Flemings were declared entitled to the possession of the premises in the pleadings mentioned, and to a conveyance thereof, pursuant to the true intent and meaning of the indenture of the 3rd of May 1791. Taaffe was declared entitled to his costs in the cross-cause, and was directed on payment of such costs to execute a conveyance accordingly, with a reference to the Master to settle a conveyance, if the parties differed. The defence then states that, in pursuance of that decree, the deed of December 1820, which is, as to the lands and reservation, in the very terms of the deed of 1791, was executed. The defence then further avers that the judgments at law, and the decrees stated, are in full force and effect; and that, by these judgments, and the last mentioned decree, the very question raised by the first paragraph of the plaint was decided; and all this is relied on as an equitable defence to the action.

This defence has been demurred to by the plaintiff; and the first question for our consideration is, its validity.

We are all of opinion that the demurrer must be allowed. Various causes of demurrer were relied on; and the defence does indeed appear to me to be open to many objections; but I shall content myself with referring to one only. The defence cannot be sustained unless the first decree therein stated constitutes a clear ground in equity for perpetually restraining the plaintiff from asserting that exclusive right to turbary which he claims in this action. Now the deed, so far as it declares any right, declares a right only to the soil of the lands comprised in the deed of 1791, and that right is not questioned in this suit; and, so far as the deed of 1820 is to be considered as incorporated in the decree, that leaves all other questions in the precise state in which they were

left by the deed of 1791. Again, though the plaintiff's assignee Taaffe sought, by his bill, a declaration of his exclusive right to turbary, and his bill was dismissed, I can regard that dismissal as deciding nothing but his failure to establish that equitable right; and, to a bill seeking a declaration of such right, the decree might be an answer. I apprehend it is not correct to say that a party, seeking equitable relief in respect of an instrument on which he can sue at law, and whose bill is dismissed, though without stating such dismissal to be without prejudice, is necessarily subject to be restrained from proceeding at law on the same instrument. In the case of bills for the specific performance of agreements, though the bill be dismissed without any saving of the plaintiff's right to proceed at law, I believe it to be well settled that the plaintiff may proceed at law; and that, if the defendant would restrain him, he must show, by bill, some substantive equity for the purpose. In this case the Court of Chancery, in truth, appears to have passed no judgment of its own, but to have dismissed Taaffe's suit, simply on the ground of his failure to establish his right at law, in an action or actions, which could not, without the aid of a Court of Equity, have conclusively established the right. The decree in the cross cause contains no declaration of right, except as to the soil, not now in question, and no proviso restraining Taaffe from further proceeding at law. I see nothing therefore to warrant us in holding that the decree would constitute of itself, or with the judgments at law, an equitable bar to this action. No case can better illustrate the effect of a mere dismissal of a bill for equitable relief than *Tatham v. Wright*, possibly one of the most pertinaciously contested cases in the books; all the pleadings in it will be found reported in *7 Ad. & Ell.*, p. 313. Tatham filed a bill in Chancery, praying that the will of his ancestor might be declared to have been obtained by fraud and undue influence, and void. An issue *devisavit vel non* was directed. It was tried in 1830, and there was a verdict for the will, and against Tatham. A new trial was moved for, before Sir John Leech, and he refused it; the motion was repeated before the Lord Chancellor Brougham, who called Chief Justice Tindal and Lord Lyndhurst to his assistance, and they, in 1831, refused the

T. T. 1862.

*Exchequer.*

BEERE

v.

FLEMING.



T. T. 1862.  
*Eschequer.*  
**BEERE**  
 v.  
**FLEMING.**

new trial, and the then Master of the Rolls dismissed the bill. These proceedings are reported in 2 *Russ & M.*, p. 1. Thereupon Tatham brought his ejectment, notwithstanding the decree of dismissal, on an issue raising the very same questions as he sought to raise in his ejectment. The ejectment was tried in 1833, and there was a verdict for Tatham; a bill of exceptions was taken by the defendant, and the Court awarded a *venire de novo*. The ejectment was again tried in 1834, and there was a verdict for the defendant, against Tatham. The Court, on motion, set aside that verdict; and the case was tried again in 1836, and Tatham obtained a verdict and judgment; there was a bill of exceptions, on the argument of which the Court was equally divided, and which is the case reported in 7 *Ad. & Ell.* The judgment for Tatham was, in consequence, affirmed; and finally there was an appeal to the House of Lords, in which that judgment was upheld; and thus Tatham, whose bill had been dismissed after trial of an issue on the same question, finally recovered the estate: *Wright v. Tatham* (a).

The second defence to the first paragraph of the plaint is in the nature of a demurrer to the paragraph, and oyer of the deed of December 1820. It sets out various statements in the deed, which, in the view of the case I take, it is unnecessary to state particularly. The object is to show that the deed is to be read as if it were a grant, not merely of land, but of bog *eo nomine*. I shall assume that this is so, though it appears to me far from clear; and the defence then suggests that a reservation or exception of turbarry is inconsistent with, and repugnant to, a grant of bog, and therefore void.

This defence has also been demurred to, and the second question for our consideration is, its validity.

In support of the defence, it is argued that all turbarry must mean either of two things—an exclusive right to dig the turves of the bog, or the place where the turves are found, that is, to the bog itself. In the latter view, the reservation or exception would be repugnant; and it is equally so in the other view, because it would be a reser-

(a) 5 Cl. & F. 670.

vation of all the profits of the bog, which would, in effect, be the bog itself.

T. T. 1862.

*Eschequer.*

BEERE

v.

FLEMING.

I do not stop to consider whether this argument would be affected by treating the deed either as a re-grant or a grant. It seems to me that if turbary and bog can have a different meaning, we are bound to give them such different meanings, so as not to render any part of the deed ineffectual. Now, it seems to be clearly settled, that the grant of an exclusive right of digging turves will not be a grant of the soil; and for the very reason, that the turves are not the sole profit of the soil. I think therefore that this reservation of an exclusive right to dig turves is not inconsistent, as a reservation (if such it can be) or otherwise, with the grant of the bog. *Co. Litt.*, 44, b, is express:—"So, if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not pass, because but *part of the profits* is given; the trees, mines, &c., shall not passe:" and this position is recognised in the case cited from *Burrow*, by the whole Court, the question being one of a certain right to turbary. I have only to add that bog is the soil, and that ejectment will lie for it *eo nomine*, as was decided in *Cro. Car.* p. 512.

The third defence is founded on the Statute of Limitations; and there are similar defences to this, to the second and third paragraphs of the plaint. These defences allege, in substance, that the grantees in the deed of December 1820, and those deriving under them, including the defendants, have been in the exclusive, undisturbed, and adverse possession of all the bog and turbary in respect to said house and lands, ever since the said 22nd of December 1820; and the defendants rely on the 3 & 4 W. 4, c. 27.

All these defences have been demurred to; and the last question for our consideration is, the validity of these defences.

The answer appears to me to be, that, it being once established that the turbary is not the soil, but a profit *a prendre*, it is not within that statute. It seems quite clear that an ejectment would not lie for it; at all events, except as appurtenant to land.

On the whole therefore I think the demurrers must be allowed.

T. T. 1862.

Eschequer.May 31.  
June 2, 7.

## SPAIGHT v. TWISS.

Extracts from the Books of Distribution are admissible in evidence, in questions arising upon the quantities and descriptions of land granted by patents, made under the Acts of Settlement and Explanation.

*Knox v. The Earl of Mayo*  
(7 Ir. Chan. Rep. 563) affirmed.

THIS was an action of trespass, which was tried before Mr. Justice O'Brien and a special jury, at the Summer Assizes for the North Riding of the county Tipperary, 1861. The first three counts of the summons and plaint charged that the trespasses had been committed by the defendant on the lands of Legane, Killary Hayes, and Towntina, on the 12th of June 1860; the fourth count charged them as committed on the lands of Legane, on the 23rd of July 1860.

The first three defences denied the commission of the trespass upon the lands of Legane, Killary Hayes, and Legane; the fourth defence denied that the lands of Towntina were the lands of the plaintiff; the fifth and seventh defences alleged that the lands whereon the trespasses were committed were the lands of Towntina, although called Legane and Killary Hayes in the first and second counts. The sixth, eighth, ninth, and tenth defences justified the alleged trespasses, as a user by the defendant's tenants, and by his directions, of certain rights of common; and claimed over the lands of Towntina, as appurtenant to certain lands and houses of the defendant, a right of common of pasture, of taking peat and turf mould for manure, as also of turbary. These rights were claimed, both under the statute, as having been enjoyed for thirty years, and as having been enjoyed from time immemorial. On the above pleadings, forty-six issues were raised.

At the trial, the plaintiff gave in evidence (*inter alia*) an attested copy of a patent of the 18 Car. 2 (July 1666), granting to Samuel Wade and his heirs (amongst other lands) Legane, containing 163 acres, or thereabouts, of profitable land, plantation measure, and 41 acres of unprofitable land; and Cottoone, containing 183 acres, or thereabouts, of profitable land, plantation measure, and 41 acres

\* Coram FITZGERALD, HUGHES, and DEASY, BB.

unprofitable ; and also all castles, manors, &c., common and common of pasture, &c. &c., thereto appertaining ; also several deeds, tracing the lands mentioned in the patent to Mr. Head's family ; also a deed of conveyance to Francis Spaight (the father of the plaintiff) and his heirs, dated the 3rd of December 1845, from Master Goold, Henry Head, and others, made in pursuance to the decree in *Beere v. Head*. This deed conveyed to Francis Spaight and his heirs (amongst other lands) Legane, containing 163 acres, or thereabouts, profitable land, plantation measure ; and Coltoone, otherwise Colloone, otherwise Killary, containing 183 acres, or thereabouts, of profitable land, plantation measure, and 63 acres unprofitable land. Besides conveying all common, common of pasture, &c. &c., this deed stated, after enumerating other lands, in addition to the above, "all which said lands are now known by the names and descriptions "of (amongst others) Coulbawne, Ryninch, Killary Foger, Killary, "and Killary Hayes, Englishtown, Middleton, Towntina, Legane," &c. &c. The plaintiff also gave in evidence the Chancery rental in *Beere v. Head*, and the map annexed ; and having proved the commission of the acts complained of, closed his case, with liberty to go into a rebutting case as to commonage.

The defendant gave in evidence a tracing of part of the Down Survey, including (amongst others) the following lands, viz. :—  
 "No. 86—Legane, arable and pasture, 163 acres ; ditto, bog, 41  
 "acres : No. 87—Coolloone, arable and pasture, 183 acres ; ditto,  
 "mountain, 41 acres : No. 113—Inchidrina, arable and pasture,  
 "115 acres : No. 114—Moynahana, arable and pasture, 177 acres ;  
 "ditto, bog, 30 acres and 4 acres : No. 118—Tunting, common to  
 "the adjacent towns, mountain, 441 acres." Also an attested copy of an extract from the Book of Distributions.

Counsel for the plaintiff objected to the reception of the evidence above given ; his Lordship received it, but took a note of the objection. The defendant also gave in evidence an attested copy of a patent of the 18 *Car.* 2 (July 16, 1666), which granted to Patrick Allen and his heirs (amongst other lands) Inchidrinane, containing, by estimation, 109 acres profitable land, or thereabouts ; part of the same, called Ballymantig, containing, by estimation, 115 acres profitable land,

T. T. 1862.  
*Eschequer.*  
 SPAIGHT  
 v.  
 TWISS.

**T. T. 1862.** and 30 acres unprofitable, or thereabouts; Moynahan, containing, *Erchequer.*  
*SPAIGHT*  
*v.*  
*TWISS.* by estimation, 177 acres profitable land, or thereabouts, and 34 acres unprofitable land, or thereabouts; together with all castles, &c. &c., common of pasture, &c. &c., thereto appertaining. That patent, after enumerating other lands thereby granted, and the rents subject to which they were granted, contained the following statement:—"All which said several rents, for said lands and premises, "containing, in the whole, 4730 acres, 37 perches, by the Down "Survey, of the plantation measure," &c. &c. And further, a conveyance, of the 16th of April 1859, by the Landed Estates Court, to the defendant and his heirs, of the town and lands of Ballymalonebeg, formerly known as part of Inchidrina, containing 157a. 3r. 34p., statute measure, or thereabouts, with the appurtenances, and more particularly described in the map thereto annexed; and also the town and lands of Ballymalonemore, *alias* Moynabane, containing 40a. 3r. 39p., statute measure, or thereabouts, to hold the same, subject to the tenancies in the schedule, and to such rights of way, rights of common, and other easements (if any) as existed in or over the lands at the time of the sale thereof. The defendant gave evidence of rights of common, by several witnesses, over certain portions of the lands in question, and within a lockspitted line, which the plaintiff's witnesses proved was made in the year 1849, as the boundary between the plaintiff's father's estate and that of Mr. Henry's estate, afterwards purchased by the defendant. This line was made in pursuance of the decision of two arbitrators, appointed by Mr. Spaight and Mr. Henry. From the time that this lockspitted line, and a fence inside it, towards the plaintiff's lands were made, the plaintiff's father, and, after his death, the present plaintiff, had endeavoured to prevent the exercise of the right of common by the tenants of the defendant, over the lands in question, within the boundaries which then existed. The plaintiff had summoned to the Killaloe Petty Sessions, and fined thereat, some of the defendant's tenants; but, upon an appeal to the Thurles Quarter Sessions, a consent was entered into, whereby the defendant undertook to defend an action of trespass. The jury found that the trespasses complained of had been committed on the lands of Towntina, and that

the several rights of common had been enjoyed over those lands up to the year 1848; whereupon the learned Judge directed a verdict to be entered for the defendant.

T. T. 1862.  
*Exchequer.*  
SPAIGHT  
v.  
TWISS.

A conditional order for a new trial, upon the grounds of the admission of illegal, and the rejection of legal, evidence, that the the verdict was against the weight of evidence, and for misdirection, having been obtained—

*Rollestone* (with whom was *J. E. Walsh* and *W. Ryan*) now showed cause.

The Down Survey and the Books of Distribution are evidence to show what passed under patents, granting lands mapped out and described in both those works, and made a short time after their completion: *Knox v. The Earl of Mayo* (a), overruling *The Archbishop of Dublin v. Lord Trimbleston* (b); 1 *How. Rev. Ex.*, p. 217, 2 *ib.* 115–157; 17 & 18 *Car.* 2, c. 2, ss. 5 and 13.

Acts of user over Towntina, up to the year 1848, were proved, but the right was not then extinguished, in consequence of the possession of the plaintiff: *Co. Litt.* 114, b.

Serjeant *Armstrong* (with him *T. Harris* and *Tandy*), contra, denied the admissibility of the Books of Distributions and the Down Survey as evidence; and, as to the estoppel of the defendant, by the acquiescence of Mr. Henry, whose estate he had purchased, they cited *Regina v. Chorley* (c); *Cairncross v. Lorimer* (d); *Ward v. Ward* (e).

*J. E. Walsh*, in reply.

*Cur. ad. vult.*

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FITZGERALD, B.

In this case the plaintiff having obtained a conditional order to set aside the verdict had for the defendant at the last Summer Assizes for the county of Tipperary, on the grounds of the admission of illegal evidence, the rejection of legal evidence, misdirection

June 7.

(a) 7 *Ir. Chan. Rep.* 563; *S. C.* (*Cas. temp. Napier*), 225.

(b) 12 *Ir. Eq. Rep.* 251, 286.

(c) 12 *Q. B.* 515.

(d) 7 *Jur.*, *N. S.*, 149.

(e) 7 *Exch.* 838.

T. T. 1862. by the learned Judge who tried the case, and that the verdict was  
*Exchequer.*  
 SPAIGHT  
 v.  
 TWISS. against the weight of evidence, cause was shown before us in  
 this Term.

The action was one of trespass *quare clausa fecit*. By the three first paragraphs of the plaint, the plaintiff complained of trespass on his respective closes of Legane, Killary, and Towntina, all alleged to have been committed in the month of June 1860; and in the fourth paragraph he complained of a further trespass on Legane, in the month of July 1860.

With respect to the trespasses in the first, second, and fourth paragraphs, they were denied by defences filed on the part of the defendant; and the issues found on those defences were found for the defendant, on the ground, as I understood the case, that the trespasses actually proved were not committed either in Legane or Killary.

With respect to the trespass in the third paragraph mentioned, there was a defence that the lands of Towntina were not the lands of the plaintiff, and as that issue was found for the plaintiff, it will not be necessary for me to say much more of it.

The only other defences which it appears necessary for me to consider are defences which, as to such *locus in quo* denominated in the plaint Legane and Killary, aver that they are erroneously described by those names, being each of them part of a denomination of land called Towntina, and which defence as to them and the close called Tontina, aver a right by prescription, in the occupiers of lands adjacent to that denomination, to three distinct kinds of common on those lands, in the exercise of which rights the alleged trespasses were committed by the occupiers of lands adjacent, being the lands of the defendant, and by his authority. On the material issues joined on those defences, the jury found for the defendant: and it may be proper to observe here, that the learned Judge told the jury, and without objection, that they could not so find as to Legane and Killary, without being satisfied that what was so called in the first, second, and fourth paragraphs, was really Towntina.

The plaintiff's title is under letters patent of King Charles the Second, to one Wade, of the lands of Lygane and Cottoone; and

from the deeds by which he traced his title from that patent, it appeared that different parts of these lands had acquired new names, and (*inter alia*) the denominations of Legane, Killary, and Towntina. They were originally granted with all common and rights of common belonging to them. The owner of the estate, immediately preceding the plaintiff's father, was named Head; and the plaintiff's father became the purchaser in a Chancery case of *Beere v. Head*, in the year of 1845.

T. T. 1862.  
*Eschequer.*  
 SPAIGHT  
 v.  
 TWISS.

The defendant claims title to adjoining lands, under letters patent of the same King, and of about the same date, to one Allen, of the lands of Inchidrinane and Moyneghan, and it appeared that Moyneghan was, as to parts of it, subsequently known by the name of Ballymalone; they were originally granted with all rights of common belonging to them. The owner of this estate, immediately preceding the defendant, was named Henry; and the defendant purchased the lands in the Landed Estates Court in 1859. There was no question that parts of the estates of both the plaintiff and the defendant abutted on a piece of mountain land called Towntina Mountain; nor was there, as far as I can understand, any question that the defendant was entitled to exercise such rights of common as he claimed by his occupying lands upon that mountain. The real substantial question between the parties was, in my opinion, whether the *locus in quo* of each alleged trespass was within or without the boundary between that mountain and plaintiff's lands.

The plaintiff, *inter alia*, proved the map under which he purchased in the Chancery cause of *Beere v. Head*, and a comparison of that map with the Down Survey, a copy of a part of which was produced by the defendant, showed, as it appears to me very clearly, that each *locus in quo* of the alleged trespasses was without the boundary of the lands granted by Wade's patent, and within the boundary of what is marked in the Down Survey as Towntina, common to the adjacent lands, being the mountain in question.

The reception in evidence of the Down Survey is the first matter objected to. If admissible, it was clearly material to one important question in the case, viz., the boundary between the plaintiff's lands and this mountain denomination of Towntina. So far as I know,



T. T. 1862.

Exchequer.

SPAIGHT

v.

TWISS.

no such objection was ever before made to the admissibility of the Down Survey as between parties deriving under such patents as those I have already stated; and we all know that it is every day's practice so to receive it; and there is clear authority for its reception in evidence more extensively: I need only mention the case of *The Archbishop of Dublin v. Trimleston* (a), relied on by the plaintiff for another purpose. But the defendant further offered in evidence the copy of an extract from the Book of Distributions, relating to the lands in question, for what precise purpose I have, I confess, not been able perfectly to understand; I presume for the purpose of identifying the lands in the Down Survey with the lands granted by the respective patents. The reception of this document is the only remaining matter of objection relied on as to the evidence; and on the authority of the before mentioned case of *The Archbishop of Dublin v. Trimleston*, and a short reference to a case called *King v. Daly*, in a note to 2 *How. Exch.* p. 115, we are asked to say that absolutely, and for no purpose, are the Books of Distribution evidence. I confess that even if I were of opinion that the reception of this piece of evidence was unwarranted, that would not affect my mind on the question of a new trial, because I am unable to discover what aid it could have given to the jury in coming to the conclusion to which they did, in any respect in which there was not the completest evidence without it. But I am not prepared to say that the Books of Distribution are not evidence; and with deference, it seems to me incorrect to say, as was said in *The Archbishop of Dublin v. Trimleston*, following the note in *Howard*, that these books are mere abstracts of surveys. They do contain abstracts of three general surveys of Ireland; but they contain besides, the distribution of the several lands therein mentioned, that is to say, the acres distributed, the names of the persons to whom distributed, and the mode of distribution, whether, by certificate, patent, &c. Having heard an argument, to which I have more than once referred, from Mr. *Todd*, in the case of *Knox v. Mayo*, I am not prepared to say that it very clearly appears by what authority these books were originally made; but

(a) 12 Ir. Eq. Rep. 251, 266.

they were public documents of very considerable antiquity; according to 2 *Howard*, p. 115, it is from them that the constats of charges of rent, and reports on references for the Court of Exchequer, have been used to be made up by the Auditor-General; and bearing in mind what was said by the very eminent persons who decided the case of *Knox v. Mayo*, and which I have myself heard to have been repeatedly stated in the Profession, as to the long practice of receiving those books in evidence without objection, I cannot bring myself to say that absolutely and for no purpose are they evidence. It does not clearly appear, either from 12 *Irish Equity Reports*, or from *Howard*, for what purpose they were tendered in *The Archbishop of Dublin v. Trimleston* or *King v. Daly*; and if only tendered so far as they were abstracts of a survey, of which the original was in existence, the decisions may have been quite right. No objection to the reception of legal evidence at the trial was argued before us.

The defendant gave a great body of evidence of the uninterrupted exercise of the rights of common claimed by the occupiers of his lands, as far as the memory of aged witnesses extended, up to the time of the purchase of the plaintiff's estates by his father in 1845. In or about 1847 or 1848, however, the plaintiff appears to have severed a portion of the Towntina mountain adjacent to his own lands from the rest, and to have interfered with the exercise of those rights by the occupiers of the defendant's lands. And in the year 1850, an arrangement of some kind seems to have been come to between the plaintiff's father and a receiver under the Court of Chancery over the defendant's estates, then owned by Mr. Henry, whereby a portion of the Towntina mountain adjacent to the defendant's lands, marked upon a map then made, was agreed to be treated as the defendant's property: this, it is suggested, was made with full knowledge on the part of Mr. Henry, that the plaintiff's father had secured for himself a portion of the mountain adjacent to his own lands, as already stated, and with a view of sanctioning in return that appropriation. The map produced appeared to have been signed by an agent of the plaintiff and by the owner; but it showed nothing further in the form of it, than the appropriation

T. T. 1862.

Exchequer.

SPAIGHT

v.

TWISS.

T. T. 1862. made to the defendant. This assignment was made by the receiver  
*Eschequer.* in the first instance, and without Mr. Henry's knowledge, but it was  
 SPAIGHT sworn that he afterwards approved of it. Shortly after this trans-  
 v. action, the plaintiff's father put up a new fence, marking off the  
 TWISS. portions of Towntina mountain which he had detached for himself.

The *locus in quo* of each alleged trespass is in or within that fence; and after it was set up the user of the rights of common within the fence was disputed, though still on several occasions exercised by the present defendants, but who were treated as trespassers, and fined as such by the Magistrates, the present plaintiff, on some of those occasions, I deeply regret to say, sitting as a Magistrate.

Upon the evidence of user thus interrupted in 1847 or 1848, and the interrupted user after, but particularly calling the attention of the jury to those interruptions as material evidence on the question, the learned Judge left the question of immemorial usage to the jury, without objection, so far as has been argued before us, except these two:—

First—That he was called on to tell the jury, that if they believed the evidence as to the transaction of 1850, and that it was acquiesced in by Henry, with knowledge by Henry of the severance then actually made by Spaight from Towntina mountain, of the *locus in quo* of each trespass, they ought to find that all rights of common affecting each *locus in quo* was released or extinguished.

Secondly—To tell the jury that this transaction, with such acquiescence, was evidence of a release or extinguishment of the right.

The learned Judge declined to comply with either requisition, and, in my opinion, very properly. No such case as that of relinquishment of a clearly admitted right of common was made on the pleadings; no such issues were joined between the parties; and from this, I am bound to say, it appears to me that no such case was thought of before the trial. The only legitimate use of what was done 1848 or 1850 was made of it, viz., to sustain the necessary title of the plaintiff to the soil of part of Towntina.

The learned Judge has reported that he is perfectly satisfied

with the verdict, a feeling of satisfaction, in which I acknowledge that I, so far as I have heard of the case, entirely concur. And these being all the objections argued before us, I am of opinion that the cause shown must be allowed with costs.

T. T. 1862.  
*Eschequer.*  
SPAIGHT  
v.  
TWISS.

### CARPENTER v. TEELING.\*

June 14, 16.

THE summons and plaint in this case complained that the defendant assaulted and imprisoned the plaintiff for eight hours. Pleas:—first, a traverse of the committal of the alleged grievances; secondly, “that, before and at the time of the committal of the alleged grievances, &c., &c., the defendant was Local Inspector of the Four-courts Marshalsea, and the plaintiff was prisoner therein; and “the defendant says, the Lord Lieutenant, under and by virtue “of the statutable enactments in that behalf, duly made and published certain rules, which he directed to be the rules of the “Four-courts Marshalsea; and by the said rules it is, amongst “other things, provided that if any person, being a prisoner in “the said Marshalsea, shall behave in a disorderly manner, the “Marshal may confine every prisoner so offending in the punishment cell, for any period not exceeding twenty-four hours; and “by the said rules it is further provided that all the powers of “punishment of prisoners vested under the said rules in the Marshal shal also extend to the Local Inspector; and the defendant says “that, at the time of the committal of the alleged grievances, “and on several occasions theretofore, the plaintiff, while such “prisoner as aforesaid, did behave in a disorderly manner; and “for such disorderly behaviour the defendant, as Local Inspector

The power of making and altering the rules and regulations of the Four-courts Marshalsea, and of every prison in Ireland, was transferred by the 19 and 20 Vic., c. 68, s. 3, from the Court of Queen's Bench to the Lord Lieutenant. The powers of inspection and punishment given to the Marshal by the thirtieth of the rules of 1857, for the regulation of the Four-courts Marshalsea, may be exercised by the Local Inspector, under the thirty-seventh of those rules, when the Marshal is present in the prison, as well as when he is absent, or ill.

*Semle*—That the Deputy Marshal can exercise the powers of the Marshal only during the illness or absence of the latter.

\* *Coram* PIGOT, C. B., FITZGERALD and HUGHES, BB.

T. T. 1862. "as aforesaid, ordered the plaintiff to be confined in the punish-  
*Eschequer.*  
 CARPENTER "ment cell for eight hours;" which is the assault and imprisonment  
 v. "in the summons and plaint complained of, and no other."

TEELING. The third defence alleged a similarly derived power in the Local  
 Inspector, to imprison any prisoner in the Marshalsea "for using  
 insolent language;" and the use of such language by the plaintiff.

The fourth defence alleged the same power, in the case of any  
 prisoner in the Marshalsea who should "act in any manner con-  
 trary to the good order or discipline of the prison;" and a breach  
 of the latter by the plaintiff.

At the trial, before the LORD CHIEF BARON, at the Sittings after  
 Hilary Term 1862, the defendant gave in evidence, not the original  
 rules of the Four-courts Marshalsea, signed by the Lord Lieutenant  
 in 1857, but a copy thereof. Several persons having proved a  
 search for the original rules signed by the Lord Lieutenant, his  
 Lordship admitted the copy in evidence, notwithstanding the  
 objections raised by the plaintiff's Counsel. At the close of the  
 defendant's case, Counsel for the plaintiff called upon his Lordship  
 to direct a verdict for the plaintiff upon the pleas of justifica-  
 tion, on these grounds, that none of the requisites of the 19 & 20  
*Vic.*, c. 68, had been complied with; that the Lord Lieutenant was  
 not authorised to make the rules of 1857, which, in addition, were  
 not warranted either by the 5 & 6 *Vic.*, c. 28, 7 *G.* 4, c. 74, or  
 any Act of Parliament. His Lordship refused to comply with the  
 above requisitions; and the jury found for the plaintiff upon the  
 issues as to the commission of the trespasses; and for the defendant  
 on the plea of justification.

A conditional order for a new trial, upon the ground of misdirec-  
 tion, having been obtained by *D. C. Heron*, cause was now shown  
 by—

Serjeant *Armstrong* (with whom was *J. O'Hagan*).

The 19 & 20 *Vic.*, c. 68, s. 3, transfers to the Lord Lieutenant  
 of Ireland all the powers, rights, authority and jurisdiction, there-  
 tofore vested in, or exercised by, the Court of Queen's Bench in  
 Ireland over the Four-courts Marshalsea, or the prisoners therein,  
 under the 7 *G.* 4, c. 74, s. 112. Under the former Act, the rules

of the Four-courts Marshalsea, dated the 29th of August 1857, T. T. 1862.  
 were framed. The thirty-seventh of those rules declares that *Exchequer.*  
 "All the powers of inspection and punishment of prisoners vested *CARPENTER*  
 "under those rules in the Marshal or his deputy shall also extend *v.*  
 "to the Local Inspector of the Four-courts Marshalsea, for the *TEELING.*  
 "time being, and to the Deputy Marshal, during the illness or  
 "absence from any cause of the said Marshal." The thirtieth  
 rule of 1857 declares that, if any prisoner "shall molest, injure  
 "or assault any of the officers of the prison, or any other pri-  
 "soner, or any other person in the prison, or shall behave in a  
 "disorderly manner, or make use of any violent, abusive, inso-  
 "lent or profane language, or use any taunting or irritating  
 "expressions to a prisoner, or shall otherwise act in any man-  
 "ner contrary to the prison rules, or the good order or discipline  
 "of the prison, then the Marshal may confine every prisoner so  
 "offending in the punishment cell, for any period not exceeding  
 "twenty-hours, and report the same forthwith to the Local In-  
 "spector, if the confinement takes place in the day time, between  
 "the hours of opening and closing the prison, and on the fol-  
 "lowing morning, if it should take place at night," &c. &c. &c.  
 Sufficient proof was given at the trial of the loss of the original  
 rules of 1859, which were signed by the Lord Lieutenant of  
 Ireland.

*D. C. Heron* (with whom was *James Hamilton*), for the  
 plaintiff, contended, that the Local Inspector had not the power  
 of imprisonment; and, assuming that he had, it could be exer-  
 cised only during the illness or absence of the Marshal.

PIGOT, C. B.

The question whether the defendant, as Local Inspector of the  
 Four-courts Marshalsea, Dublin, had authority to commit the  
 plaintiff, while he was a prisoner in that prison, to confinement  
 in the "punishment cell," for disorderly conduct, under the thir-  
 tieth of the prison rules, 1857, depends upon the further questions,  
 first, whether the prison rules relied on by the defendant are

T. T. 1862. *authentic and binding? secondly, whether the defendant, as Local*  
*Eschequer.*  
 CARPENTER *Inspector, had authority, under the thirty-seventh rule, to act on*  
*v.* *any other occasion there during the absence or illness of the Mar-*  
 TEELING. *shal? The 109th section of the Irish Prisons Act (7 G. 4, c. 74)*  
*enacts, "That the rules and regulations" therein mentioned "shall*  
*"be strictly observed and carried into force and effect in every gaol,*  
*"house of correction, Marshalsea, bridewell, Sheriff's prison, and*  
*"other prisons throughout Ireland, so far as the same shall be*  
*"practicable therein." Then follow certain rules, among which*  
*is one (the fifteenth), empowering the keeper of every prison to*  
*punish any prisoner who may have been guilty of any act of*  
*misconduct, by imprisoning him in the refractory or solitary cells.*  
*The 112th section of the Prisons Act then enacts (among other*  
*things) that, in case new and additional rules and regulations*  
*for all prisons, or for any particular prisons, should be made,*  
*"That it shall and may be lawful for his Majesty's Court of King's*  
*"Bench in Ireland, if such Court shall think proper, to order, direct*  
*"and ordain, that any such rules or regulations, whether temporary*  
*"or permanent, shall be made for the better government of all or*  
*"any prison or prisons in Ireland," &c. Then comes the 19 & 20*  
*Vic., c. 68, the third section of which is in these words\*—[Here*  
*the LORD CHIEF BARON read the section.]—The effect of that*

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\* The 19 & 20 Vic., c. 86, s. 111, enacts that, "From and after the passing of this Act, all the powers, right, authority and jurisdiction, now vested in or exercised by her Majesty's Court of Queen's Bench in Ireland, or the Judges thereof, or any one or more of them, by virtue of the said recited Acts, or any of them, over or with respect to the Four-courts Marshalsea, or any county prison in Ireland, whether gaol, bridewell or house of correction, or the prisoners therein, or any matter relating to such Marshalsea, prison or prisons, shall be transferred to, and vested in and exercised and performed by, the Lord Lieutenant, as fully and effectually, to all intents and purposes, as if the said Lord Lieutenant had been named in the said recited Acts instead of the said Court of Queen's Bench, or the Judges thereof, or any one or more of them; and all the provisions of the said recited Acts, or any of them, directing any function or duty to be exercised or performed by, or any matter or thing to be done by or with the approbation of the said Court of Queen's Bench in Ireland, or the Judges thereof, or any one or more of them, in relation to or concerning the said Marshalsea, or any such county prison as aforesaid, or the prisoners therein, shall, from and after the passing of this Act, be deemed and taken to apply and extend to the said Lord Lieutenant, instead of the said Court of Queen's Bench, or the Judges thereof, or any one or

section is to transfer from the Court of Queen's Bench to the Lord Lieutenant all the powers of making and altering prison rules, which the Court of Queen's Bench had under the 7 G. 4, c. 74. In the year 1857, a series of rules and regulations for the prison of the Four-courts Marshalsea were made by the Lord Lieutenant; and a printed copy of those rules was produced at the trial, as secondary evidence of the original. By those rules various regulations were made for the government and good order of the prison, and in reference to the authority of the Marshal, and to the performance of the duties of the Marshal, and of the Local Inspector. By the thirtieth of those rules it is provided, "That any person who shall violate that rule, or otherwise act in any manner contrary to the prison rules, or the good order or discipline of the prison, may be confined by the Marshal in the punishment cell, for any period not exceeding twenty-four hours." The thirty-seventh rule then provides, that "All the powers of inspection and punishment of prisoners vested under those rules in the Marshal or his deputy, shall also extend to the Local Inspector of the Four-courts Marshalsea, for the time being, and to the Deputy Marshal, during the illness or absence from any cause of the said Marshal." What construction are we to give to these two sections? Are we to hold that the powers conferred upon the Local Inspector can be exercised only during the illness

T. T. 1862.

*Exchequer.*

CARPENTER

v.

TEELING.

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more of them; and the said Lord Lieutenant shall thenceforward have, exercise and perform, all the same powers, rights, authority and jurisdiction, in respect of the said Marshalsea, or any such prison or prisoners, or any matter relating to the same, as might have been exercised or performed under the said recited Acts, or any of them, by the said Court of Queen's Bench, or the Judges thereof, or any one or more of them, in case this Act had not been passed; provided that nothing in this section contained shall be construed to limit or affect the duties or powers of the said Court of Queen's Bench; and all and every Judge and Judges of Assize and General Gaol Delivery in Ireland, under sections 131, 132, 133 and 134 of the Prisons Act; and provided further, that the Judges of her Majesty's Court of Queen's Bench, Common Pleas and Exchequer, or of her Majesty's High Court of Chancery or Admiralty, and the Commissioners of the Court of Bankruptcy, and the Commissioners of the Court for Relief of Insolvent Debtors in Ireland, shall have and exercise the same powers, in so ordering the Marshal of the Four-courts Marshalsea to take into custody any person committed by them respectively, or to bring before them any prisoner in his custody, which the said Judges now have with respect to the Marshal of the said Four-courts Marshalsea."



T. T. 1862.

*Exchequer.*

CARPENTER

v.

TEELING.

or absence of the Marshal? I think not. If it was intended that there should be but one officer invested with the authority which the rules confer upon the Marshal, while the Marshal should be present, there seems no reason to enlarge the number by conferring the authority on two officers, during the illness or absence of the Marshal, there was no necessity for conferring it on the Local Inspector. The law requires that there shall be a Deputy Marshal: the Deputy has, under the thirty-seventh rule, unquestionably authority to act in the absence of the Marshal, or during his illness. Why then should the powers of the Marshal be extended to the Local Inspector, if the exercise of those powers was to be confined to the absence or illness of the Marshal? It seems to me that the more reasonable construction of the thirty-seventh rule is, that it contemplates a plurality of officers and tribunals, for "inspection" and for "punishment" of offenders, as well when the Marshal should be present and acting as during his illness or absence. The phraseology of the thirty-seventh rule certainly is slovenly and loose; but the first part is hardly sensible, unless it be read as conferring on the Local Inspector generally all the powers of inspection and of punishment given by the rules to the Marshal or his Deputy; and the second part of the rule seems more naturally to be applied to restrict the powers of the Deputy Marshal to the illness or absence of the Marshal, than to limit the powers of the Local Inspector to such absence or illness. It seems inconsistent with the name and character of the Local Inspector that he should not have, on every visit, all "powers of inspection" which it was intended to give to him whenever he should visit the prison, whether the Marshal should be present or absent; and if, while the Marshal is in the prison, and is able to act, the thirty-seventh rule gives to the Local Inspector the Marshal's "powers of inspection," it gives him, in the same sentence, the Marshal's power of "punishment of prisoners."

An objection was taken at the trial to the admission of evidence of the plaintiff's conduct prior to the doing of the act which immediately led to his imprisonment. I am of opinion that this evidence was rightly received: a good deal of it was directed to show that

the plaintiff, by following the defendant about the Marshalsea while the defendant was engaged in the duty of inspecting it, and by using opprobrious terms, and insulting gestures, pursued a course of conduct calculated injuriously to affect the "good order and discipline of the prison" [thirtieth rule], and to give a pernicious example to the other inmates of the Marshalsea. The object of that evidence was to show that the act committed by the plaintiff, for which he was punished, was one of a series of similar acts. As the previous acts of a person are admissible to prove malice in a particular transaction, so, in this case, I was and am of opinion that the act of the plaintiff, on the occasion in reference to which he was committed to confinement in the cell, was to be looked at by the light of his previous conduct. Indeed I am not at all satisfied that it would not have been competent to the defendant to give evidence of acts, disorderly in character, committed by the plaintiff, for days previous to the occurrence, of such a nature that it was the defendant's duty to check them, and to treat the series of the defendant's proceedings as one entire course of misconduct, which reached its climax on the day and on the occasion on which the plaintiff was committed to confinement in the "punishment cell."

As to the reception of secondary evidence of the rules and regulations of the Four-courts Marshalsea, the case is perfectly clear. It was proved that the office of the Inspector General of Prisons was the proper place for the custody of the original rules; that search had been made there, and that the original rules, with the Lord Lieutenant's signature prefixed thereto, which it was proved had been in that office on the 27th of August 1857, could not be found. The original draft of these rules, approved by the Attorney-General and Solicitor-General of the time, was produced by an officer from the office of the Inspector-General of Prisons. He proved that he had compared that draft with a printed copy of the rules; and he proved that to that printed copy the signatures were attached of the Lord Lieutenant and of the Under Secretary. The document so signed (which could not be found) thus became the original rules, made by the Lord Lieutenant, under the 19 & 20 Vic., c. 68. The same officer proved that the printed copy produced at the trial agreed

T. T. 1862.  
*Exchequer.*  
 CARPENTER  
 v.  
 TEELING.

T. T. 1862.  
*Eschequer.*

CARPENTER  
v.

TEELING.

with the draft approved of by the Attorney-General and Solicitor-General, with which draft the original had conformed, which was signed by the Lord Lieutenant and Under Secretary. It is difficult to conceive a case in which a clearer ground could be laid for secondary evidence, and in which secondary evidence more clear and satisfactory could be given.

We are all of opinion that the cause shown against the conditional order should be allowed with costs.

### HAGARTY v. NALLY.

June 11, 12.  
July 12.

The lessee of lands *pur autre vie*, by his will, made in the year 1832, devised "half of his lands to his son A."—*Held*, that under that devise, whether the lands were held in fee or *pur autre vie*, A took an estate for life only.—Classification of the cases upon devises similar to the above.

The *habendum* of a deed, although void, may be looked at, together with the other parts of the deed, to qualify the estate granted by the premises.

THIS was an action of ejectment on the title, brought by Patrick Hagarty a minor, by his next friend, against Mathew Nally and Jane Nally, otherwise Hagarty, his wife, to recover possession of "that part of the lands of Ballinaskea, formerly in the possession of the defendants." At the trial, before the Lord Chief Justice, at the Spring Assizes 1862, for the county of Westmeath, the plaintiff gave in evidence a lease of the lands in question, made in the year 1794 by William Tighe to Thomas Byrne, for the lives of the lessee, and of his sons Thomas and James Byrne. It was proved that, in 1827, the heir of the lessor having brought an ejectment for non-payment of rent, Thomas Byrne allowed judgment to go by default; and on the 15th of January 1829, when the period for redemption had expired, the Right Hon. W. F. Tighe, by lease and release, demised the lands of Ballinaskea to Maurice Hagarty, "to hold unto the said Maurice Hagarty, his heirs, executors, administrators and assigns, *from* the day of the decease of Thomas Byrne, of Ballinaskea, and James Byrne, of Wicklow, and the "survivor of them, for and during the life of James Hagarty." Maurice Hagarty died in the year 1832, and by his will devised "half of his lands" to his son Maurice Hagarty the younger, and

"the other half of his lands" to his son James Hagarty. Maurice Hagarty the younger died in 1859; and by his will, which was proved by his wife Jane Hagarty, one of the defendants, he bequeathed to her all his land and chattel property, during her life, provided she did not marry; and if she did, he gave them to Patrick Hagarty, the plaintiff. Jane Hagarty married Matthew Nally, on the 22nd of October 1861. It was proved that all the lives in the lease of 1794 were dead; that one of the lives named in the lease of 1829 was in existence; that, from the death of Maurice Hagarty the elder, his son James had paid the rent for the whole of the premises, receiving from Maurice the younger his moiety of the rent; and that, since the death of the latter, Jane Hagarty the defendant had paid the rent up to November 1861. No demand of possession was made upon the defendants.

T. T. 1862.  
*Exchequer.*  
 HAGARTY  
 v.  
 NALLY.

At the close of the plaintiff's case, the defendant's Counsel called upon his Lordship to nonsuit the plaintiff, first, because there should have been a demand of possession from Mrs. Nally before the action was brought; secondly, because the will of Maurice the younger conferred upon Mrs. Nally the defendant (then Mrs. Hagarty) an estate for her own life, defeasible upon breach of the condition against her second marriage; that the action was an ejectment for a forfeiture; and therefore to avoid that, a freehold estate, an entry before action brought was necessary; and thirdly, because Maurice the younger derived no larger estate than one for his own life, under the devise to him of "half the testator's lands," without any words of limitation, and as the residue of the freehold estate of Maurice the elder reverted to his heirs-at-law, and was within the disposition of Maurice the younger at the time of his death, the plaintiff took nothing under the will of the latter, and consequently had no right to recover. The Lord Chief Justice refused to nonsuit the plaintiff, but reserved the points. The defendant then gave in evidence a bill, filed in the Court of Chancery in the year 1829, wherein Thomas Byrne prayed that he might be put in possession of the lands demised to Maurice Hagarty the elder, in the above year. The bill was dismissed; the answer of Maurice Hagarty the elder stating, that the lease of 1829 was a new lease, made for his own benefit.

T. T. 1862. *Eschequer.*  
**HAGARTY**  
 v.  
**NALLY.**

The Counsel for the defendant then submitted that the lease of 1829 did not operate as a grant of the reversion, but as an attempt to create a freehold to commence *in futuro*, and that Maurice Hagarty's possession under it was only as tenant from year to year; and if so, that the plaintiff must fail upon either of the following two grounds:—first, because Mrs. Nally, under the will of Maurice the younger, being the first taker of the tenancy from year to year, acquired the whole interest in it; secondly, if this was not so, yet, as Mrs. Nally was her late husband's personal representative, the whole interest vested in her, until she assented to the bequest over to the plaintiff; and this she has not shown to have ever done—her entry upon the lands, she being such personal representative, as well as tenant for life, not being sufficient for that purpose.

The Lord Chief Justice, when charging the jury, told them that there was evidence that the lease of 1794 was subsisting, and was vested in Maurice Hagarty the elder at the time of the making of the lease of 1829; and that, if they acted upon such testimony, they should find for the plaintiff. His Lordship also told the jury that the entry of Mrs. Nally, as her husband's executrix, upon the lands, was sufficient evidence of the assent to the bequest over, in the event of her marrying a second time. Counsel for the defendant objected to the charge, on the grounds before stated. The jury found a verdict for the plaintiff.

*George Battersby*, having obtained a conditional order for a new trial—

*C. Palles* (whom was *J. T. Ball*) now showed cause.

The devise of "half of my lands" gave the fee to Maurice Hagarty the younger: 2 *Jar.*, p. 264; *Montgomery v. Montgomery* (a); *Doe d. Atkinson v. Fawcett* (b); *Green v. Marsden* (c). The lease of 1829 was not a lease to commence *in futuro*. The *habendum*, if repugnant to the premises, may be rejected: *Goodtitle v. Gibbs* (d); *Baldwin's case* (e); *Doe d. Phillips v. Rollings* (f).

(a) 3 Jon. & Lat. 47.

(c) 1 Dru. 646.

(e) 2 Rep. 476.

(b) 3 Com. B. 274.

(d) 5 B. & C. 709.

(f) 4 Com. B. 188.

Mrs. Nally assented to the bequest over, by taking the profits of the lands: 2 *Wms. on Ex.*, p. 1184. T. T. 1862.

Exchequer.  
HAGARTY  
v.  
NALLY.

*G. Battersby* (with whom was *J. A. Byrne*) contra.

A lease of freehold to commence *in futuro* is void: *Buckler's case* (a); *Hogg v. Cross* (b); *In re Newton* (c); *Doe d. Lewis v. Lewis* (d); *Doe d. Kerr v. Cassidy* (e); *Roe d. Wilkinson v. Trarmer* (f); *Gilbert on Uses*, p. 163. As to the estate taken by Maurice Hagarty jun., as executor of Maurice Hagarty sen., *Lampet's case* (g), *Ripley v. Waterworth* (h), and 1 *Vic.*, c. 26, ss. 3 and 6, were also cited.

*J. T. Ball*, in reply.

*Cur. ad. vult.*

FITZGERALD, B., delivered the judgment of the Court.

In my opinion, the case of *Goodtitle v. Gibbs* (i) is an express authority that the *habendum*, in the lease of January 1829, had not the effect of making that lease void, as the grant of a freehold to commence *in futuro*.

July 7.

It would seem to me also that the same case is an authority that the *habendum*, though void so far as it purports to give a future commencement to the present estate granted by the premises, may notwithstanding be, together with the other parts of the deed, looked at, for the purpose of qualifying the estate granted by the premises to Maurice Hagarty and his heirs, according to the intention of the parties, and rendering it an estate *pur autre vie*.

It is however unnecessary to determine whether Maurice Hagarty's estate was, by the release, an estate in fee or *pur autre vie*.

I am also of opinion that the will of Maurice Hagarty the lessee, whereby he devised half his lands to his son James, and half his

(a) 2 Rep. 55, note i.

(b) Cro. El. 254.

(c) 6 Ir. Jur. 153.

(d) 9 M. & W. 662.

(e) 1 Hud. & B. 222.

(f) 2 Wil. 74; S. C., Will. 662.

(g) 10 Rep. 358.

(h) 7 Ves. 425.

(i) 5 B. & C. 709.

T. T. 1862. lands to his son Maurice, and which will was made in the year  
*Eschequer.* 1832, passed a life interest only to his son Maurice Hagarty the  
 HAGARTY younger.  
 v.

NALLY.

The case of *Doe v. Robinson* (a) establishes that a devise of lands, held *pur autre vie*, is, in this respect, to receive the same construction as a devise of lands held in fee.

Here the authorities relied on by the Counsel for the plaintiff, in which the words "moiety," "share," and the like, have been held to pass the fee in a will, appear to me to apply only to cases in which they are coupled with the word "my," or other words, showing that they indicate, not a division, made by the testator through his will, but the *quantum* of his own interest antecedent to the will; in which view they are treated as equivalent to a gift of all that he has in the lands.

This seems to me the very ground of the decision in one of the earliest of these authorities—*Paris v. Miller* (b). "This is *not* the devise," says Lord Ellenborough, "of a portion, which the 'devisor has carved out of the entirety. It existed in her as it is devised. The words 'my share,' as it seems to me, were used 'as denoting an interest.' And this reasoning is adopted in the later case of *Doe v. Fawcett* (c).

On the other hand, *Fawcett's case*, *Vin. Ab.*, tit. *Devises*, L. a, p. 11, is an authority that the devise of a moiety, created by the testator himself in the will, will not pass the fee.

It is not shown that Maurice Hagarty the younger was the heir-at-law of the testator Maurice Hagarty the elder; and it seems to me, for the reasons stated, that the former took no devisable interest under his father's will; and therefore the plaintiff, who claims under a devise from Maurice Hagarty the younger, has failed in showing title in himself.

On these grounds, I am of opinion that the rule for a new trial ought to be made absolute.

(a) 8 B. & C. 296.

(b) 5 M. & S. 408.

(c) 3 C. B. 274.

M. T. 1862.  
Exchequer.

## SEYMOUR v. CLARKE.\*

Nov. 5, 7.

THIS was a motion to set aside a writ of *ca. sa.*, under which the defendant had been arrested, and was still in custody. The following were the facts of the case:—

In the month of March 1861, the plaintiff issued a summons and plaint against the defendant, for the sum of £1851. The defendant, whose stock-in-trade amounted to the value of £700 only, proposed to pay that sum at once, and to discharge the balance in five annual instalments. An application, embodying that proposition having been made to Master Murphy, the Master in the cause of *Seymour v. Seymour*, upon the 30th of April 1861, it was ordered:—"That the said James H. Clarke be at liberty, within twenty days, to invest the sum of £700 in Government £3 per cent. stock, and transfer same to the credit of this matter, with the privity of the Accountant-General of this Court; and that upon said sum being so invested, the proceedings at law taken against the said James H. Clarke, by the petitioner Alice Seymour, for the recovery of the sum of £1851, be stayed. And it is further ordered, that the said J. H. Clarke shall pay the balance thereof, being £1151, by five separate instalments of £230. 5s. 5d. each; the first of said instalments to be invested in said Government stock, and transferred to the credit of this matter on the 1st of May 1862, and each subsequent instalment on the 1st day of May in each subsequent year, until the full sum be paid off. And it is ordered, that in case default be made by the said J. H. Clarke, in payment of any of said instalments, then that the said Alice Seymour be at liberty to continue the said proceedings at law, and mark judgment, and issue execution thereon against the said J. H. Clarke, for the entire sum then due, but not otherwise. It is further ordered, that no judgment be marked on foot of the

A debtor, arrested on a judgment, and discharged, cannot be arrested again upon foot of that judgment, or any portion thereof; notwithstanding that he may have obtained his discharge upon an undertaking to pay the amount of the judgment debt by instalments, and that that undertaking is embodied in an order of a Master of the Court of Chancery, which, while directing his discharge, declared that the judgment should stand as a security for the instalments. The violation of such an undertaking amounts to deception only, but not to fraud, so as to render the discharge void.

The proper modes of effectuating such an undertaking.

\* Before the Full Court.



M. T. 1862. "said proceedings at law, against the said J. H. Clarke, until he  
Eschequer.  
 SEYMOUR "shall make default in payments of the instalments before men-  
 v. tioned." The defendant not having complied with the terms of  
 CLARKE. that order, the plaintiff's attorney marked judgment for £1858, on  
 the 6th of July 1861, and issued a writ of *ca. sa.* upon the 8th of  
 July, under which the defendant was arrested the day following.  
 Prior to his arrest, the defendant had realised all his stock-in-trade,  
 which had produced the sum of £659. Upon the 9th of July 1861,  
 a second application, on the part of the defendant, was made to  
 Master Murphy, who thereupon made the following order:—

"Whereas Mr. Sterne, solicitor for J. H. Clarke, a third person,  
 "this day moved that the said J. H. Clarke be discharged from the  
 "custody of the Sheriff of the county of Dublin, under the writ of  
 "*ca. sa.* which issued at the suit of Alice Seymour, widow, upon  
 "his paying to the said Alice Seymour the sum of £659; where-  
 "upon, and on reading the order of the 30th of April 1861, and the  
 "letters of credit produced by Mr. Sterne," the solicitors for the  
 other parties to the cause attending,—“It is ordered that the said  
 “J. H. Clarke be discharged from the custody of the Sheriff of the  
 “county of Dublin, upon the said J. H. Clarke handing over to the  
 “said Henry Roche (plaintiff's solicitor) the letters of credit for  
 “said sum of £659. And it is further ordered, that the judgment  
 “obtained against the said J. H. Clarke do stand as security  
 “for the balance of such execution, to be paid by instalments,  
 “as in said order of the 30th of April mentioned.”

The defendant, having made default in payment of the next  
 instalment, was arrested on the 22nd of October 1862, under a  
*ca. sa.*, issued on foot of the judgment of July 1861, marked for  
 the sum of £1199; whereupon this motion was made.

*W. R. Cusack Smith*, for J. H. Clarke.

A defendant cannot be taken in execution twice on the same  
 judgment, though he were discharged the first time by the plaintiff's  
 consent, upon an express undertaking that he should be liable to be  
 taken in execution again, if he failed to comply with the terms

agreed on : *Blackburn v. Stupart* (a) ; *Vigers v. Aldrich* (b) ; *Clarke v. Clement* (c) ; *Tanner v. Hague* (d) ; *Jaques v. Withey* (e) ; 1 *Ferg. Prac.*, pp. 446-7 ; *Atkinson on Sheriffs*, p. 203 ; *Denton v. Godfrey* (f). M. T. 1862.  
*Exchequer.*  
SEYMOUR  
v.  
CLARKE.

*J. E. Walsh* and *C. Tandy*, for the plaintiff.

Admitting the general rule to be that a debtor once discharged cannot be again arrested for the same debt ; there is no authority that the discharge of a debtor will prevent his being arrested for an instalment of the original debt, pursuant to a decree or order of a Court of competent jurisdiction. The discharge of the defendant was obtained by fraud committed in the Master's office, therefore it was void : *Baker v. Ridgway* (g). Where a debt is agreed to be paid by instalments, the debtor, if arrested for the whole and discharged, may be arrested for non-payment of the successive instalment : *Atkinson v. Bayntun* (h) ; *Barrack v. Newton* (i).

FIGOT, C. B.

Two grounds were relied on in support of this motion ; one, that there was compulsion on the plaintiff's attorney, in the order of the Master of the Court of Chancery, of the 9th of July, which order, it is alleged (and I think rightly, upon the documents), was obtained by the defendants ; secondly, that the order of the 9th of July was obtained by the defendants by fraud. And if these two propositions had been made out, the case would have probably been brought to range within the principle of the decision of *Baker v. Ridgway* (k). My inference, from the affidavits and documents, is, that the plaintiff's attorney signed the consent for the defendant's discharge in obedience to the order of the 9th of July ; which, in effect, made it obligatory on the plaintiff, or on Mr. Roche (who was bound to apply the money to be paid by the defendant in the

Nov. 7.

(a) 2 East, 242.

(b) 4 Burr. 2483.

(c) 6 Term, 525.

(d) 7 Term, 420.

(e) 1 Term, 557.

(f) 11 Jur. 800.

(g) 9 Moo. 114 ; S. C., 2 Bing. 41.

(h) 1 Bing., N. C., 444 ; S. C., 1 Scott, 404.

(i) 1 Q. B. 525.

(k) 9 Moo. 114.

**M. T. 1862.**Exchequer.**SEYMOUR****v.****CLARKE.**

manner specified in the order) to do all that was necessary to effectuate that part of the order which directed the defendant's discharge, as the equivalent for the payment of the money. He could not have been discharged without a consent or authority, given on the part of the plaintiff in the action; for, the discharge not having been ordered on the ground of privilege, the Sheriff would probably have declined to act upon the order, and to disobey the writ under which he was directed safely to keep the defendant, unless it was followed by the consent of the plaintiff, or sanctioned by the Court of Law. But it is perfectly plain that the mere fact that the plaintiff or his attorney acted in conformity with the substantial exigency of the order to discharge the defendant from custody, confers no right whatever on the plaintiff to take him in execution again. The Sheriff, the officer of the Court of Law, acted, in discharging the defendant, on the plaintiff's authority, and not on the order of the Master. The proceedings in the Court of Law are not affected by that order; and if the plaintiff has been prejudiced by the compliance with the order made in the Court of Chancery, to that Court only can she resort for redress. Then, was that order obtained by the defendant's fraud? In consequence of the statements and arguments urged on the discussion of the motion, I wished to look into the affidavits, the orders, and the notices, with a view to consider whether any such fraud existed. I can find no ground for imputing any. No false statement was made to the Master. I think indeed that the defendant is now acting in violation of what was intended by all parties in the obtaining of the order, and in contravention of the offer contained in the defendant's notice of the motion on which the order was made; and which offer the Master adopted in directing that the judgment should stand as a security for the balance unpaid. I think it was intended that the judgment, which *was* obtained on the 6th of July, should stand as a security for the unpaid balance, in precisely the same manner, and to the same extent, as the judgment which was *to be* obtained, as contemplated in the order of the 30th of April. That order of the 30th of April is

referred to in the order of the 9th of July; and it directs, in terms, that execution may be issued for the whole unpaid balance, on default being made in the payment of any of the stipulated instalments. But this is really nothing more than a violation of the defendant's undertaking, given by his notice of the 8th of July, and of the order of the 9th of July. It does not follow that any deception was then practised on the Master, like the deception practised in the case of *Baker v. Ridgway*. In the case of *Blackburn v. Stupart (a)*, and in several others, some of which are there cited, the defendant was released from a second arrest for the same cause, although he had positively stipulated that such arrest might be made. And I see no reason to impute, in the present case, anything more than that all parties fell into an inadvertence of the rule which prevails in Courts of Law—namely, that even the defendant's consent and undertaking, on the occasion of his discharge, shall not warrant his second arrest upon the same judgment, for the same debt: on the ground that, at law, the arrest and discharge amount to a satisfaction of the judgment. The defendant, doubtless, has since learned that he may take advantage of this rule of law. Whether that be, or be not, a course to be condemned, is not the question in this motion. In the case of *Blackburn v. Stupart*, the Court very strongly condemned the defendant's conduct. But this consideration cannot fasten on the defendant the imputation of fraud, in the obtaining of the order of the 9th of July. Supposing therefore that the defendant's fraud in the obtaining of the order would have disentitled him to his discharge, upon the principle of the decision in *Baker v. Ridgway*, the plaintiff fails in establishing the legality of the second arrest on that ground.

A case of *Denton v. Godfrey (b)* was referred to; and I thought, as I understood it when cited at the Bar, that it might have had some bearing on this case: on looking at it, I find that it has none. There, one of several co-defendants was arrested, and was discharged upon a consent order, by which it was stipulated that *he* should be liable, on non-payment of any of certain

M. T. 1862.  
*Eschequer.*  
 SEYMOUR  
 v.  
 CLARKE.

(a) 2 East, 243.

(b) 11 Jur. 800.

M. T. 1862.

Exchequer.

SEYMOUR

v.

CLARKE.

stipulated instalments, to be again arrested. A subsequent execution was issued; which, of course, must have issued in form against all the defendants on the record. The Court made an order, directing that the execution should not be executed against one of the defendants, who applied for that purpose, and who was no party to the consent order. But the defendant who had been arrested was not before the Court, and no decision was made as to the effect, in reference to him, of the consent order.

The truth (according to my view of this case) is, that there has been, in the proceeding in the Court of Chancery, a miscarriage (in executing what, I believe, was intended there), which we, in this Court, cannot remedy. What ought to have been done, to carry out the intention of the parties, was, that the defendant should give a new security (as by a cognovit in an action commenced by a new writ, or by a bond and warrant of attorney), embodying the stipulations of the order. According to the case of *Atkinson v. Baynton (a)*, and several other other authorities, it is competent for a plaintiff, after an arrest for one instalment only, to arrest again for a future instalment (being of course a different sum), on the non-payment of it, where the defeazance of the judgment so provides, and where it is so framed as not to require the suggestion of breaches under the statute. But that must be by a contract of defeazance, made at or before the judgment, and governing the proceeding by execution upon it. The intended result might have been accomplished also by vacating the judgment of the 6th of July, and making an order similar to that of the 30th of April. A future judgment, entered by consent on non-payment of any of the instalments (which consent might have been embodied in a consent for judgment), would have answered the same purpose.

As the matter stands, we are bound, and I regret it, to comply with so much of the order as seeks the defendant's discharge. He is not entitled, by quashing or setting aside the writ, to withdraw from the Sheriff the protection which the writ affords him.

(a) 1 Bing., N. C., 444.

M. T. 1862.  
*Exchequer.*

## BURNS v. THE CORK AND BANDON RAILWAY CO.

Nov. 10, 20.  
 H. T. 1863.  
 Jan. 31.

THIS case came before the Court upon a demurrer taken to the several defences to the summons and plaint. The latter, which contained three counts, charged that the defendants, who were carriers of passengers, did not carry the plaintiff from Cork to Bandon within a reasonable time, or safely, as they had contracted to do.

The defendants pleaded, first, a denial of the contract as alleged; secondly—"And for a further defence to the first count of the writ of summons and plaint, and by leave of the Court, the defendants say, that the contract in the said first count mentioned was subject to a condition not mentioned in the said first count, to wit, that the defendants should not be liable to the plaintiff for any delay, loss or damage, occasioned by any inevitable accident, without default or negligence on the part of the defendants. And the defendants say, that the alleged breach of contract, in the said second count complained of, was occasioned solely by an inevitable accident, which occurred without default or negligence on the part of the defendants, to wit, that while the plaintiff was, pursuant to the aforesaid contract, being carried by the defendants from Cork to Bandon, in their carriages on their railway, in the said second count mentioned, a fracture occurred in a crank-pin on one of the leading wheels of the locomotive engine attached to the train of carriages in which the plaintiff was so being carried as aforesaid; and the defendants say, that the said fracture was occasioned by an original defect in the material and construction of the said crank-pin, and in the inside or centre thereof, which said defect, before the said fracture occurred, was not capable of being detected by the defendants, upon due and proper examination or observation; and the defendants say, that

Although a carrier of passengers does not warrant their safety, or their due arrival at their destination, yet he warrants that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects of construction, and road-worthy, as far as human care and foresight can provide.

A railway company, who purchased their rolling stock from competent manufacturers in the due course of business, are responsible for the negligence of those manufacturers in the construction of that stock, to the same extent as they would be in case they were themselves the manufacturers.

A defence by a railway company, relying upon an inevitable accident, must state all the facts which they contend

constitutes such inevitable accident.

**M. T. 1862.** *Exchequer.*  
**BURNS**  
**v.**  
**CORK AND**  
**BANDON**  
**RAILWAY.**

"the said crank-pin was purchased, together with the said locomotive engine, by the defendants, in the due course of business, from competent manufacturers thereof, and was not made by the defendants; and that, on the day in the said first count mentioned, and shortly before the commencement of the said journey, the defendants duly and properly examined the said locomotive engine and crank-pin, and had not, at any time before the said fracture, any notice of the said defect in the said crank-pin." To this second defence the plaintiffs demurred.

*G. Waters* (with whom was *C. Barry*), in support of the demurrer.

The occurrence of an accident upon a railway, by reason of an engine or carriage breaking down, is *prima facie* evidence of negligence on the part of the railway company: *Dawson v. Manchester, Sheffield, and Lincolnshire Railway Company* (a). A carrier of passengers is bound to provide a sound and sufficient carriage to convey them all through the journey; and he is liable for any defect in the carriage which could be discovered by human foresight: *Christie v. Griggs* (b); *Israel v. Clark* (c); *Crofts v. Waterhouse* (d). This is not an inevitable accident; for it ensued from a defect in the construction, and a carrier of passengers is liable for such an accident, although the defect be out of sight, and not discoverable upon ordinary examination: *Sharp v. Grey* (e); *Grote v. The Chester and Holyhead Railway Company* (f). If the material be proved to have been defective, there must have been an absence of due care in the selection of the engine by the defendant; therefore, the latter was not purchased "in the due course of business."

*W. M. Johnson* and *H. E. Chatterton*, in support of the pleadings.

Whether the defendants have been guilty of negligence or not, and not the warranty of the vehicle, is the sole question to be

(a) 5 Law T., N. S., 682.

(b) 2 Camp. 79.

(c) 4 Esp. 259.

(d) 3 Bing. 319.

(e) 9 Bing. 457.

(f) 2 Exch. 251.

decided by the Court: *Aston v. Heaven* (a); *Harris v. Costar* (b); *Ross v. Hill* (c); *Bretherton v. Wood* (d); *Chitty on Contracts*, 6th ed., p. 440: *Powell on Carriers*, p. 22-7, and *Story on Bailments*, ss. 890 *et seq.* Where the negligence of a railway company is attributable to the use of engines containing a flaw or defect, which ought to have been observed, the question is not whether, according to the evidence of a scientific and speculative nature, it might *possibly* have been detected, but whether practically, and by the use of *ordinary* and *reasonable* care, it ought to have been observed: *Stokes v. The Eastern Counties Railway Company* (e). The plea of inevitable accident, without any default of the defendants, being good, the immaterial averments contained under the *scilicet* cannot impair it: *Hammond v. Calls* (f); and all matters informally pleaded are admitted upon general demurrer: *Hancock v. Prowd* (g); *Tilson v. The Warwick Gas Company* (h); *Kellett v. Stannard* (i); *Stapleton v. Bergin* (k); *Lindsay v. O'Neill* (l); *Cuthbertson v. Irving* (m); *Buckley v. Kiernan* (n); *Clarke v. Scully* (o). The mere occurrence of an accident is not proof of negligence; the plaintiff must show negligence by affirmative evidence: *Hammack v. White* (p); *Doyle v. Wragg* (q); *Bird v. The Great Northern Railway Company* (r). "In the due course of business" is a material averment, and properly pleadable: *Patience v. Townley* (s); *Dudlow v. Watchhom* (t).

C. Barry, in reply, cited *Winterbottom v. Wright* (u).

PIGOT, C. J.

This case comes before us on a demurrer to the defendant's fur- H. T. 1863.  
Jan. 31.

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|--------------------------------|----------------------------------|
| (a) 2 Esp. 533.                | (b) 1 Car. & P. 630.             |
| (c) 2 Com. B. Rep. 877.        | (d) 3 Brod. & Bing. 54.          |
| (e) 2 Fost. & Finl. 691.       | (f) 1 Com. B. Rep. 916.          |
| (g) 1 Saund. 337 b, note 3.    | (h) 4 B. & C. 962.               |
| (i) 2 Ir. Com. Law Rep. 156.   | (k) 4 Ir. Com. Law Rep. 421.     |
| (l) 5 Ir. Com. Law Rep. 461.   | (m) 4 Hurt. & N. 742.            |
| (n) 7 Ir. Com. Law Rep. 75-80. | (o) 7 Ir. Com. Law Rep., Ap. iv. |
| (p) 31 Law Jour., C. P., 129.  | (q) 1 Fost. & Finl. 7.           |
| (r) 28 Law Jour., Exch., 3.    | (s) 2 Smith's Rep. 223.          |
| (t) 16 East, 39.               | (u) 10 M. & W. 109.              |
| VOL. 13.                       | 69 L                             |



H. T. 1863.

*Eschequer.*

BURNS

v.

CORK AND  
BANDON  
RAILWAY.

ther defences to the first, second, and third counts, in the summons and plaint. Those counts complain of breaches of contracts by the defendants, to carry the plaintiff from Cork to Bandon. The first defence demurred to states that the contract was subject to a condition that the defendants were not to be liable for any damage caused by inevitable accident, without default or negligence on the part of the defendants, and that the breach of contract complained of was caused solely by an inevitable accident, which occurred without default or negligence on the part of the defendants. If the defence had stopped there, it might have been proof against a general demurrer, because it is perfectly settled that a carrier of passengers is not an insurer, and does not warrant the safe or due arrival of his passengers. But the defendants go on to specify, as I apprehend they were bound to do, the nature and particulars of the accident which they rely on as relieving them from the consequences of the breach of contract, which this defence admits. I think that the general averments in the introductory part of the plea are qualified and controlled by those which follow, descriptive of the nature of the accident on which the defendants rely, and that they are, and ought to be, limited in proof at the trial to that particular species of incidental accident which they set forth; and that the question we have to decide is whether, taking all the averments in the plea together, they have stated facts which exempt them from liability to the consequences of the breach of contract which the plea admits? I am of opinion they have not, according to the existing state of authorities. Although a carrier of passengers does not warrant the safety or the due arrival of his passengers, yet I consider that he must be considered as warranting that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects, at least as far as human care and foresight can provide, and perfectly roadworthy. In *Christie v. Griggs* (a), Sir J. Mansfield says:—"There was a difference between a contract to "carry goods, and a contract to carry passengers; for the goods carrier was answerable at all events; but he did not warrant the "safety of the passengers. This undertaking, as to them, went no

(a) 2 Camp. 81.

"farther than this that, as far as human care and foresight could go, he would provide for their safe conveyance." That is open to the objection that it is only the opinion of a Judge expressed at Nisi Prius; but, in *Sharp v. Grey* (a), the question came before the Court of Common Pleas. There, the accident was caused by the breaking of the axletree, in a part covered with wood. The maker of the coach swore that it was made of the best material, yet the Court held that the defendant was liable. Gazelee, J., says:—"The burden lay on the defendant to show that there was no defect in the construction of the coach." Bosanquet, J.:—"The Chief Justice held that the defendant was bound to provide a safe vehicle; and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy; and the defendant is liable for the consequences, on the same principle as a ship-owner who furnishes a vessel which is not seaworthy." Alderson, B.:—"I am of the same opinion. A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy." In *Grote v. Chester and Holyhead Railway Company* (b), that case was cited; and Parke, B., says:—"In that case, the coach proprietor is liable for an imperfection in the vehicle, although he has employed a clever and competent coach-maker." In that case of *Grote v. Chester and Holyhead Railway Company*, the action was brought against the company for an injury caused by the breaking of a bridge; and Pollock, C. B., in giving his judgment, says:—"It cannot be contended that the defendants are not responsible for the accident merely on the ground that they employed a competent person to construct the bridge." We have not been referred to any case in which this liability of carriers of passengers has been qualified or diminished. That liability, according to Sir J. Mansfield, is upon a contract that, as far as

H. T. 1863.

Eschequer.

BURNS

v.

CORK AND

BANDON

RAILWAY.

(a) 9 Bing. 457; S. C., 12 Moo. &amp; S. 62.

(b) 2 Ex. 255.

H. T. 1863.

*Exchequer.*

BURNS

v.

CORK AND  
BANDON  
RAILWAY.

human care and foresight could go, he would provide for their safe conveyance. According to the Court of Common Pleas, he is bound to provide a roadworthy vehicle, and he is answerable for all the consequences resulting from its not being so at the commencement of the journey. Here, the question is, whether the defendants have stated facts sufficient to exempt them from the consequences of the rule of law so propounded? I am of opinion they have not. Their plea admits that, at the time of the commencement of the journey, their engine was defective in construction, and that the breach of contract was caused by that defect in its construction. According to the case of *Sharpe v. Gray*, that is no valid reason for not performing their contract with the plaintiff. But, applying Sir J. Mansfield's test, have they shown in their plea that, as far as human care and foresight could go, they provided for the safety of their passengers? I think they have not. Their plea does not contain any averment as to the care or skill applied to the manufacture of the engine, or as to the care or skill exercised by them in the selection or inspection of it. All the averments in their pleas are quite consistent with gross and culpable carelessness on the part of the manufacturers, and with gross and culpable negligence on their part in the purchase of it from the manufacturers. If they had been themselves the manufacturers of the engine, they would have been bound to aver and prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from local liability because they allege that they have purchased it from a competent manufacturer? I think that would be a distinction dangerous to the public; and that, as Alderson, B., says, "railway companies might buy ill-constructed or unsafe vehicles, and the public be without remedy."

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M. T. 1862.  
*Common Pleas*

M'DONALD v. BULWER.

(*Common Pleas*).

Nov. 5, 6, 21.

THIS was an action of assault and false imprisonment. The third count of the summons and plaint alleged that the defendant, on the 13th of September 1859, caused and procured the plaintiff to be arrested and taken into custody, and to be detained in such custody, and to be taken in such custody in and along divers public streets, in Athy, to a Court-house, and there to be detained in custody for the space of five hours then next following.

The fourth count alleged that the defendant assaulted the plaintiff, and unlawfully imprisoned him for five hours.

The defendant pleaded to the third and fourth counts, that at the respective times of committing the respective acts in said counts respectively mentioned, the defendant was a Justice of the Peace, duly assigned to keep the peace in and for the county of Kildare, and that on the 13th of September 1859, one Francis A. Mills, of Athy in the said county, came before the defendant as such Justice, and duly made an information upon oath before the defendant, as such Justice, in the words following, that is to say:—  
 “That he the said Francis A. Mills, about two months previous  
 “to the said 13th day of September 1859, lent a gun to one

To an action of assault and false imprisonment, the defendant pleaded that he was a Justice of the Peace for the county of K. ; that F. M. made an information on oath, that he had lent a gun to P. L., who had afterwards neglected to return same, and that he had reason to believe that it was in the possession of the plaintiff, who was a pawnbroker at A. ; that thereupon the defendant issued a warrant to the constabulary to search for the gun, and to arrest the party in whose possession it was found ;

that the police found the gun in the plaintiff's possession and arrested him, and brought him before the defendant and another Justice, who thereupon caused the plaintiff to enter into a recognizance to answer the charge at a subsequent Sessions, when an order was made for the restitution of the gun ; and that the orders and warrant had not been quashed upon *certiorari*, and still remained in force.

*Held*, that so far as the defence proceeded on the Pawnbrokers Act (26 G. 3, c. 43, s. 13), the act of the defendant could not be justified, inasmuch as it neither appeared that the gun had been unlawfully pawned, nor was there any charge of felony alleged in the information ; and that the defendant had to that extent acted without any jurisdiction ; but that regarding the warrant as one for procuring the attendance of the plaintiff at the Petty Sessions, that the subsequent orders had been made in the same matter, and that the defendant had not acted wholly without jurisdiction ; and that until the orders had been quashed pursuant to the 12 Vic., c. 16, s. 2, no action in respect of what was done under the warrant was maintainable against the defendant.

M. T 1862.  
*Common Pleas*

M'DONALD  
v.  
BULWER.

"Patrick Leonard, and that upon several occasions he the said Francis A. Mills asked the said Patrick Leonard to return the said gun to him the said Francis A. Mills, but the said Patrick Leonard neglected so to do; and that he the said Francis A. Mills had reason to believe that the said gun was then in the possession of the plaintiff, in the town of Athy aforesaid, the said plaintiff then being a pawnbroker in the said town, and in the Petty Sessions District of Athy, to the knowledge of the defendant; whereupon the defendant, as such Justice, issued a search-warrant under his hand and seal, directed to one D. H. Lawson, then being a sub-inspector of the authorised constabulary of the said county; and authorising and requiring him, on the receipt of the said warrant, to enter in the daytime, with the necessary and proper assistance, into the house of the plaintiff, and make diligent search there for the said gun; and if the said constable should find the same, or any part thereof, to bring it, together with the person in whose possession the same should be found, before the defendant or some other of the Magistrates Justices of the Peace for the said county, to be further dealt with according to law: by virtue of which warrant the constable therein named entered the house of the plaintiff, being situate within the jurisdiction of the defendant as such Justice, in the daytime, in search for the said gun, and did accordingly search therefor and found the said gun in possession of the plaintiff; which gun the plaintiff then stated to the said constable had been pawned by the said Patrick Leonard, and was then held in pawn by him the plaintiff as such pawnbroker, whereupon the said constable took the said gun and arrested the plaintiff, using no unnecessary violence in so doing, for the purpose of having the plaintiff before this defendant or some other Justice of the Peace of the said county, to be dealt with according to law; and did accordingly bring him in such custody along the streets aforesaid, to the Court-house of Athy, in the said county, before the defendant and one Benjamin Lefroy, then duly assembled at the Petty Sessions in the said Court-house in and for the district of Athy, for the purpose of being dealt

"with by the said Justices according to law: at which Court-house the plaintiff was, in the due course of business of the said Petty Sessions in and for the said district, under and by virtue of said warrant, detained for a short time in the custody of the said constable, until the said plaintiff and the said gun should be dealt with according to law, in respect of the premises, which are the trespasses," &c. Averment.—That the said several acts were respectively done after the passing of a certain statute passed in the eighth year of her present Majesty, entitled "An Act to protect the Justices of the Peace in Ireland from vexatious actions for acts done by them in the execution of their office;" and that the said respective acts so complained of were respectively done in the manner hereinbefore stated by the defendant, in the execution of his duty as such Justice of the Peace for the county of Kildare, with respect to a matter within his jurisdiction as such Justice.

M. T. 1862.  
*Common Pleas*  
**M'DONALD**  
*v.*  
**BULWER.**

The second plea, in place of the latter averment, alleged, after stating the information, warrant, and arrest of the plaintiff, that it was afterwards, to wit, on the 13th of September 1859, ordered in the same matter by the said Justices, that the plaintiff should enter into a recognizance to appear at the said Court-house, on the next day for holding the Petty Sessions at said Court-house, in and for the said county, and answer the charge of having in his possession a gun which was feloniously and fraudulently pawned by the said Patrick Leonard; and the said plaintiff having entered into such recognizance, appeared at the said Court-house, according to the exigency of the said recognizance; whereupon an order was made in said matter, and duly recorded by the Justices of the Peace for the said county, then and there assembled, in the presence of the plaintiff, that the said gun should be returned to the said Francis A. Mills: that said orders are now in full force and effect, and have not, nor has either of them, nor hath the said warrant, been quashed or revoked.

The plaintiff demurred to the first defence, upon this ground, that the several matters therein alleged showed that the acts complained of were done in a matter, of which by law the defend-

M. T. 1862.  
*Common Pleas*  
**M'DONALD**  
**v.**  
**BULWER.**

ant, as such Justice, either had not jurisdiction, or in which he exceeded his jurisdiction; and the averment that the said acts were done with respect to a matter within his jurisdiction, was an inference of law, not only unsustained by the preceding averments, but contradicted by them.

The plaintiff also demurred to the second defence, upon the ground that the said warrant was not the subject of a *certiorari*, and could not be quashed, as it was not an adjudication; and neither of the said orders was an order or conviction within the meaning of the 2nd section of the said Act of Parliament, namely the 12 *Vic.*, c. 16.

*Byrne* (with whom was Sergeant *Armstrong*), in support of the demurrer.

The first defence does not disclose a case which would in point of law warrant the arrest of the plaintiff. It is not stated that the gun was unlawfully pawned, but merely that Mr. Mills had lent the gun in question, &c. This is not sufficient to bring the case within the provisions of the Pawnbrokers Act (26 *G.* 3, c. 43, ss. 11 and 13), so far as the issuing of a search warrant; nor does it allege a felonious taking by the plaintiff, so as to justify his arrest. This, accordingly, was not a matter within the jurisdiction of the Magistrate. This defence is clearly bad, upon the authority of *Lawrenson v. Hill* (a). It was not enough to allege in the defence that the acts complained of were respecting matters within the defendant's jurisdiction, that being merely an inference of law. As regards the second defence, to make an order valid, it should be one made in the same matter; but it appears, from the information and certificate, that these were not orders in the same matter.

He referred to *Barton v. Bricknell* (b); *Learey v. Patrick* (c); *Caudle v. Seymour* (d); *Rex v. Lediard* (e); *Rex v. Lloyd* (f); *Paley on Convictions*, p. 55.

(a) 10 *Ir. Com. Law Rep.* 177.

(c) 15 *Q. B.* 266.

(e) *Sayer's Rep.* 6.

(b) 13 *Q. B.* 393.

(d) 1 *Q. B.* 892.

(f) *Caldecott's Rep.* 309.

*Jellett and J. T. Ball, contra.*

It is not necessary that the information should contain the positive statement of a felonious charge, to give a Magistrate jurisdiction; it is sufficient if such an offence can be inferred from all the facts stated. Such was the information made in this case. The Magistrate had therefore jurisdiction to issue the search warrant. If the Magistrate had jurisdiction, he was protected. With respect to the second defence, the search warrant must be taken as including the person: if so, the order which followed was clearly an order in the same matter, and may be supported as a warrant to require the attendance of the plaintiff; and if the Magistrate exceeded his jurisdiction, the warrant and orders remain in force until quashed on *certiorari*: *Elsee v. Smith* (a); *Cane v. Mountain* (b); 2 *Hale's Pleas of the Crown*, pp. 113 and 150; *Webb v. Ross* (c); *Linford v. Fitzroy* (d); *Brittain v. Kinnaird* (e); *In re Clarke* (f); 12 *Vic.*, c. 16; 20 & 21 *Vic.*, c. 54, s. 4.

Serjeant *Armstrong*, in reply, referred to the cases of *Grady v. Hunt* (g); *Newbould v. Coltman* (h); and to *Nunn and Walshe's Justice of the Peace*, p. 253.

*Cur. ad. vult.*

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MONAHAN, C. J.

This case comes before the Court upon two demurrers; one to the first, and the other to the second defence pleaded to the third and fourth counts of the summons and plaint. The third count is in the ordinary form for assault and false imprisonment; and the fourth is for an assault. To these two counts the defendant pleaded.—[His Lordship read the first defence.]—In order to support this first defence, it has been argued that, on the pleadings, the warrant in that defence mentioned appeared to be the ordinary search warrant

M. T. 1862.  
*Common Pleas.*

M'DONALD  
v.

BULWER.

Nov. 21.

(a) 1 Dow. & Ry. 102.

(c) 4 Hur. & Nor. 115.

(e) 1 Brod. & Bing. 432.

(g) 1 Ir. Jur., N. S., 10.

VOL. 13.

(b) 1 M. & Gr. 269.

(d) 13 Q. B. 247.

(f) 2 Q. B. 619.

(h) 6 Ex. 189.



M. T. 1862.  
*Common Pleas.*

M'DONALD  
v.

BULWER.

issued by a Magistrate when an information has been sworn before him that goods have been feloniously stolen, and that there are reasonable grounds stated in the information for believing that the stolen goods are in the possession of a particular person; in which case the warrant authorises the constable to search for the goods in the house of the person named in the information; and, in case the goods shall be found, to bring same, and the person in whose possession they shall be found, before the Magistrate, to be dealt with according to law. In answer to this argument, it is sufficient to say that it is not stated in the information that any felony has been committed. It is not stated that the goods were stolen; nor are any facts stated to lead to such an inference. The statement in the information is to the effect that, Francis S. Mills, about twelve months previously, lent a gun to Patrick Leonard; that Leonard had been frequently applied to, to return the gun, but neglected to do so; and that Mills had reason to believe that the gun was in the possession of the plaintiff, against whom the warrant was issued. Next, it was argued, on the part of the defendant, that though the facts stated did not amount to a larceny at common law, yet that the case came within the provisions of the 20 & 21 Vic., c. 54, s. 4, which enacts.—[His Lordship read the section.]—No doubt if it were stated here that Patrick Leonard, having been the bailee of this gun, had converted it to his own use, and had pawned it without the consent of the owner, that might have sufficed to bring the case within the operation of that statute; but here there is no statement that Leonard ever converted it to his own use: and although it does appear, by what subsequently occurred, namely, by the admission of the plaintiff to the constable, that the gun had been pawned, it does not so appear on the face of the information; and the validity of the warrant must rest on the information. There are therefore no grounds for sustaining this warrant as a search warrant for goods which had been feloniously stolen. The Counsel for the defendant next argued that the warrant could be sustained under the Pawnbrokers Act, and referred to the 13th section of the 26 G. 3, c. 43; but, to bring a case within this section, the goods must have been unlawfully

taken from the owner thereof, and the pawnbroker must have taken them in pawn with a knowledge that the person pawning them had no authority to do so. Here, there is no allegation that the goods were unlawfully taken from the owner; the allegation is, that he lent the gun. Again, the goods must have been pawned, but it is not so stated here; much less that they were knowingly and unlawfully taken in pawn; that is, that the pawnbroker had the means of knowing that they were not the property of the person pawning them. But even supposing that this information contained these necessary statements, what authority is there for arresting the pawnbroker at all? The Act only authorises the goods to be taken; and the reason of that probably is, that the pawnbroker is a person supposed to be known, and may be summoned. Upon this portion of the case, we are satisfied there is no offence alleged, within the Pawnbrokers Act, to justify the issuing of a warrant to make search on the premises, much less to arrest the pawnbroker.

The question then arises, whether an action of trespass lies for the issuing of this warrant? That depends upon the construction of the 2nd section of the 12 *Vic.*, c. 16, the Act for the protection of Justices.—[His Lordship read the section.]—If I am right, no offence is here alleged to have been committed amounting either to a felony or a misdemeanor; and if the information do not contain a charge of either, what jurisdiction had the Magistrate to bring the parties before him? The case of *Lawrenson v. Hill* was a much stronger case than this; and accordingly defendant's Counsel, on this part of the case, admitted he could not sustain his argument unless we were prepared to overrule that case. In it the written information contained no charge of felony; but there was parol evidence before the Magistrate, which afforded grounds for sustaining the charge of felony. The party was committed to prison upon a Justice's warrant, not to detain her for further examination, but that she might be tried for the particular offence. The Court of Exchequer held that, as the information contained no charge of felony, the Magistrate, in issuing the warrant, had exceeded his jurisdiction; and that accordingly an action of trespass lay against him. On the same principle, *a multo fortiori*, an action ought to

M. T. 1862.  
*Common Pleas.*  
 M'DONALD  
 v.  
 BULWER.

M. T. 1862.  
*Common Pleas*  
 M'DONALD  
 v.  
 BULWER.

lie in the present case, inasmuch as the warrant contains no statement of any offence whatsoever, nor that the Magistrate had any information of one before him. Unless therefore we were prepared to overrule that case, we must hold that the first plea is no answer to the action.

With respect to the case of *Lawrenson v. Hill*, for my own part I am perfectly satisfied that the case was rightly decided; and if we were now reviewing that case I should state the reasons why I think the judgment of the Court of Exchequer was right; but as it is now quite settled that no Court of co-ordinate jurisdiction is justified in overruling the solemn decision of a co-ordinate Court, and that that can only be done by the Court of Error, I refrain from stating my reasons for the opinion I have formed: it is enough to say, we are bound by that case. We must therefore allow the demurrer to the first plea.

The second plea to the third and fourth counts raises a question of greater difficulty. It states that, after the issuing of this search warrant, and taking the gun which had been pawned with the plaintiff, that the plaintiff was arrested, and bound over to appear at the Petty Sessions, to answer the complaint; and that, at a Petty Sessions subsequently held, an order was made in the same matter, in the presence of both parties, that the gun, which was alleged in the plea to have been pawned, although it was not so stated in the information, should be restored to the owner thereof; and that both of said orders respectively were in full force and effect, and had not, nor had either of them, nor had the said warrant, been quashed or reversed. It is contended that the order for the restoration of the gun, which followed the issuing of the warrant, not having been quashed, defeats the right of action, in consequence of the subsequent portion of the second section, which provides that "no such action shall be brought for anything done under "such warrant, which shall have been issued to procure the appearance of such party, and which shall have been followed by a "conviction or order in the same matter, until such conviction or "order shall have been so quashed, as aforesaid." It is averred here, as a matter of fact, but I do not attach much importance to

it, that this order was made in the same matter in which the warrant was issued. Even though such be averred, if I saw, on the face of the documents on record, that such were not the fact, I would not feel myself bound by the allegation in the pleading; but I would see what was the matter in which the warrant actually issued. I do not understand the word "matter," in this Act of Parliament, to mean the title of the cause in the Petty Sessions Court. We know that, according to the technicalities of the Superior Courts, orders are said to be made in a particular cause when they are entitled in that cause; but with respect to such proceedings as those under our consideration, I understand "the same matter" as meaning that the order was made in a proceeding founded on the original complaint. Now the complaint made here was, that Mills lent a gun to Leonard, and that the plaintiff was supposed to have it in his possession; whereupon the Magistrate issued a warrant to search the house of the plaintiff, and, should the gun be found, to bring the plaintiff before him. We have come to the conclusion that this was a warrant to be executed as the events should determine; that if the gun were found in the possession of the plaintiff, he was, in pursuance of the warrant, to be brought before the Magistrate, to be dealt with according to law: that is, I suppose, if the Magistrate should find that a felony had been committed, the plaintiff should be committed for trial; but if he should find that an offence was committed within the Pawnbrokers Act, then the goods should be restored to the complainant. We therefore are of opinion that the matter of complaint was the detention of the complainant's gun by the plaintiff; and that it appears that, whether right or wrong, the plaintiff was brought before the Magistrate under a warrant in that matter; and that, in the same matter, an order was made for the restoration of the complainant's gun; and that, though it is probable that this particular warrant was not within the contemplation of the framer of the Act, and that he rather contemplated the case of an ordinary warrant, to procure the attendance of the party where a formal complaint is made against him, yet we think that the warrant in the present case comes within the express words of the statute;

M. T. 1862.

*Common Pleas*M'DONALD  
v.

BULWER.

M. T. 1861.  
*Common Pleas*  
**M'DONALD**  
*v.*  
**BULWER.**

and that the fact of the order for the return of the gun to the complainant having been made in the same matter, and that order not having been quashed, affords a sufficient answer to the third and fourth counts.

We must therefore overrule the demurrer to the second defence; which will, of course, entitle the defendant to judgment so far as relates to the third and fourth counts of the summons and plaint; there being, in our opinion, a good answer to these counts.

T. T. 1862.  
*June 5.*

**NELSON v. SMALL.**

A brought an ejectment on the title, for the recovery of certain premises, which he claimed under a conveyance from B, who was the grantee of C, who had, at the time of the grant, been out of the actual possession of, and of the receipt of, the rents and profits of the premises for several years, and which possession the plaintiff sought to obtain by the present action.—*Held*, that the 10 Car. 1, sess. 3, c. 15 (*Ir.*), against maintenance, &c., and the unlawful buying of titles, was still in force, and was not repealed or affected by the 8 & 9 Vic., c. 106, s. 6, which applied exclusively to England; and consequently that the deed under which A claimed was void.

THIS was an action of ejectment on the title, brought for the recovery of the possession of a plot of ground and premises, in the town and county of Carrickfergus, and parish of Carrickfergus, formerly known by the name of Reillystown, and of a certain dwelling-house and garden, with the appurtenances, bounded as in the plaint mentioned. Defence was taken generally. At the trial of the cause, at the Spring Assizes 1862 for the town of Carrickfergus, before Hayes, J., the plaintiff's case was, that, prior to 1812, one James Caters and Elizabeth his wife were in possession of the premises in question, by their tenants, from whom they received rent, and so continued till their respective deaths, James Caters having died in 1830, and his wife in 1832. They were succeeded by their eldest son Reilly Caters, who remained in possession till his decease, towards the end of the year 1847. By his will, dated the 15th March 1847, he devised the premises to his nephew Edward Boyle, then serving with his regiment in India,

*Semble*, that the latter enactment was not intended to apply to transfers of disputed rights of entry.

who afterwards, by deed of the 8th of August 1854, conveyed the same to John M'Quillan, who, by deed of the 8th day of June 1851, conveyed the premises to the plaintiff. It appeared, by the evidence of the plaintiff's witnesses, that Small the defendant had been in possession since 1848; and that neither Boyle nor M'Quillan had ever been in possession, or in receipt of the rents. The only acts of ownership which the former had ever exercised were the knocking down of a wall, and the conveyance of the premises to M'Quillan, about a year afterwards. M'Quillan subsequently distrained Small for rent, but the latter replevied, and the proceedings were allowed to drop, and no rent appears to have been paid.

T. T. 1862.  
*Common Pleas*  
 NELSON  
 v.  
 SMALL.

At the close of the plaintiff's case, Counsel on behalf of defendant relied, amongst other things, upon the statute 10 *Car.* 1, sess. 3, c. 15, s. 2, against pretended titles, there being no evidence of possession for the space of one year before the conveyance of 1854. Counsel also relied on the Statute of Limitations. The learned Judge, without expressing an opinion upon the points raised by the defendant, considered that, under all the circumstances, it was the most prudent course not to change the possession of the premises until the plaintiff's right should be decided by the Full Court; and he accordingly took a note of the points, and then nonsuited the plaintiff; reserving liberty to him to move to have a verdict entered for him, in case the Court should be of opinion that a verdict should have been directed for the plaintiff upon the evidence given.

A conditional order having been obtained—

*S. Ferguson* (with whom was *Dix*) showed cause against the conditional order.

The 10 *Car.* 1, sess. 3, c. 15,\* entitled "An Act against maintenance, embracing, &c., and against unlawful buying of titles," is unrepealed in this country. Section 1 enacts, that all statutes made in England concerning maintenance, &c., shall be put in execu-

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\* 10 *Car.* 1, sess. 3, c. 15, s. 2:—"That no person or persons, of what estate, degree, or condition soever he or they be, shall from henceforth bargain, buy or sell, or by any ways or means obtain, get or have any pretended

T. T. 1862.  
*Common Pleas*  
 NELSON  
 v.  
 SMALL.

tion in Ireland. Section 2 expressly prohibits the sale and purchase of any pretended right to lands, of which the grantor or those through whom he claims shall not have been in possession for a year immediately preceeding the transaction, upon pain of forfeiture of the value of the land. The conveyance is absolutely void: *Doe. d. Williams v. Protheroe (a)*. There it was held that the conveyance was void, both at the Common Law, and by the analogous English statute 32 *Hen. 8*, c. 9, which the Act of *Charles* expressly extended to this country: *O'Flaherty v. M'Dowell (b)*; *Bac. Abr.*, p. 494, tit. *Maintenance*, E; *Kenney v. Browne (c)*; *Hayden v. Geraghty (d)*.

*Kernan*, contra.

There was no evidence of maintenance here. All that was proved was, that the plaintiff was a clerk in the employment of his attorney. *Doe v. Protheroe* would be decisive, unless it be repealed by the 6th section of the 8 & 9 *Vic.*, c. 108. That section enacts, "That a contingent and executory and a future interest "and a possibility, coupled with an interest in any lands, tenements, "or hereditaments, of any tenure, whether the object of the gift "or limitation of such interest or possibility be or be not ascer- "tained, also a right of entry, whether immediate or future, and

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rights or titles, or take promise, grant or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments; but if any such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents and profits thereof by the space of one whole year, next before the said bargain, covenant, grant or promise made, upon paine that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, tenements, or hereditaments, so bargained, sold, &c., contrary to the form of this Act; and the buyer or taker thereof knowing the same, to forfeit also the value of the said lands, tenements, and hereditaments, so by him bought or taken, as is above said," &c., &c.

(a) 1 Com. Bench, 717.

(b) 6 H. of L. 142.

(c) 3 Ridg. P. C. 462.

(d) Decided in this Court Trinity Term 1852, not reported.

"whether vested or contingent, into or upon any tenements or hereditaments in England of any term, may be disposed of by deed." As to the construction of that section: *Hunt v. Remnant* (a). It may be said that the word "England" restricts this enactment to England; but the reference in the latter clause of the section to the Irish Fines and Recoveries Act (4 & 5 W. 4, c. 92) shows that Ireland was intended to have been included.—[CHRISTIAN, J. Is there not a clause in the Irish Fines and Recoveries Act, enabling the assignment of contingent interests?—Section 22 does so; but it does not deal with rights of entry. Ireland was dealt with by the other sections of the 8 & 9 Vic., and is not expressly excluded from the 6th section. According to the general principle of construction, Ireland is to be considered as included when not expressly excluded, and when the subject-matter is applicable.—[MONAHAN, C. J. Has it ever been held in England that such a right of entry as this could be made the subject-matter of a conveyance? I can perfectly understand that the heir-at-law, until he gets possession, has only a right of entry, and that, if he conveys that right of entry before a dispute has arisen, the statute clearly applies to that case; but it would be a strong decision, to hold that the 8 & 9 Vic., c. 106, operates as a repeal of a well-known principle of the Common Law, and of the provisions of the statute of 32 Hen. 8, which expressly prohibit the sale of pretended titles, as in the case lately decided in England.]—But that case of *Doe v. Protheroe* was before the passing of the 8 & 9 Vic., c. 106.

T. T. 1862.  
Common Pleas.  
NELSON  
v.  
SMALL.

*Dix*, in reply.

Even if this Act applies to Ireland, it would not legalise such a transaction as the present.

MONAHAN, C. J.

It is enough for us to say that the statute of *Car.* 1 remains in force in this country, unless it has been repealed by the 8 & 9 Vic., c. 106, s. 6; and it is impossible for us to insert the word "Ireland" in that section, which is expressly confined to England. With reference to what has been said as to that section enabling parties to

(a) 9 Exch. 640.



**T. T. 1862.** convey rights of entry in England, neither myself nor the other  
*Common Pleas.* Members of the Court are to be taken as expressing any opinion  
**NELSON** whatsoever that, if a similar question arose in England, it would be  
**v.** possible to hold that that section repealed the corresponding statute,  
**SMALL.** and that it applied to disputed rights of entry. We must allow the  
 cause shown, with costs.

**M. T. 1862.**

**ENGLISH v. DUNNE.**

*Nov. 15, 21.*

A obtained a civil-bill decree against B, for £31. 3s. 6d., which was afterwards reduced by payment by instalments to £7. 3s. 6d. A, then arrested B, for the balance then remaining due. B afterwards sued A for a wrongful arrest, in respect of an amount not exceeding £10.—*Held*, that the 11 and 12 Vic., c. 28, s. 1, did not apply where the writ of execution originally issued for an amount, exclusive of costs, exceeding £10, though the amount to be actually enforced was subsequently reduced by payment below that sum; and that, accordingly, the present action was not maintainable.

THIS was an action to recover damages for maliciously and wrongfully arresting the plaintiff under a civil-bill decree, on foot of which less than £10 was due at the time of the arrest.

The first count of the summons and plaint complained that, before the committing of the grievances, &c., to wit, at a Quarter Sessions of the Peace, held before the Chairman of the King's County, at Tullamore, in the month of April 1861, the defendant Jeremiah Dunne, then being one of the registered public officers of the National Bank of Ireland, as such public officer obtained a civil-bill decree from the said Chairman, whereby it was ordered and decreed that the said Jeremiah Dunne, as such public officer, should recover from the said Robert English the sum of £30 debt, together with £1. 3s. 6d. costs, making together the sum of £31. 3s. 6d.; and that the several Sheriffs of the respective counties in Ireland were thereby commanded, &c., to take in execution the body of the said Robert English, to satisfy the said debt and costs. That after the obtaining of the said civil-bill decree by the said Jeremiah Dunne, as such public officer of the National Bank of Ireland, and before the committing of the grievances, &c., the said action was not maintainable.

*Held also*, that a civil-bill decree was in the nature of a writ of execution, as well as of a judgment.

*Shuldham v. Boles* (2 Ir. Com. Law Rep. 140) distinguished.

plaintiff paid to the said National Bank of Ireland, and the said bank accepted from him, divers sums of money, amounting in the whole to the sum of £24, on account of, and in part discharge of, the said sum of £31. 3s. 6d: and that thereupon, and at the time of the committing of the grievances, &c., the sum of £7. 3s. 6d. and no more, being the residue of the said sum of £31. 3s. 6d., after such payments, remained due and payable to the said National Bank on foot of said civil-bill decree. That the said Jeremiah Dunne, as such public officer, afterwards, to wit, on the 10th of day March 1862, although well knowing the premises, and that the said sum of £7. 3s. 6d., and no more, was due to the said National Bank of Ireland on foot of said civil-bill decree, for debt and costs, maliciously, and without any reasonable or probable cause whatever, caused and procured the said civil-bill to be delivered to the Sheriff of the King's County; and maliciously, and without any reasonable or probable cause whatever, caused and procured the said Sheriff to arrest and take the plaintiff upon the said civil-bill decree, to satisfy the said National Bank of Ireland the said sum of £30 debt, and £1. 3s. 6d. costs, so pretended to be due on foot thereof, as aforesaid; although the said sum of £7. 3s. 6d. and no more, for debt and costs, was due on foot of said civil-bill decree. And that thereupon, to wit, on the 10th day of March 1862, the said plaintiff was taken and imprisoned by virtue of said civil-bill decree, and lodged accordingly in the gaol at Tullamore aforesaid, and there kept and detained for a long time, to wit, for the space of twenty-four hours. That at the time of such arrest and imprisonment of the plaintiff as aforesaid, the sum of £7. 3s. 6d., and no more, was due to the said National Bank of Ireland, on foot of said civil-bill decree, for debt and costs; and that after the said arrest, and during the said imprisonment, and long before his discharge, he was able and willing to pay the said sum of £7. 3s. 6d.; and that afterwards he was discharged from such arrest and imprisonment, and satisfied the said decree by payment of said sum of £7. 3s. 6d., and no more: and that, by reason of the premises, &c.

There was a further count for assault and imprisonment.

The defendant pleaded that at the time the said Jeremiah Dunne,

M. T. 1862.  
*Common Pleas*  
 ENGLISH  
 v.  
 DUNNE.

M. T. 1862.  
*Common Pleas*  
 ENGLISH  
 v.  
 DUNNE.

as such public officer, caused and procured the civil-bill decree in the first count of the summons and plaint to be delivered to the Sheriff of the King's County, as in said count alleged, a sum exceeding £10 for debt was due upon said decree, the costs by said decree recovered having been previously paid by said defendant; and that the defendant did not, save by the delivery of the said civil-bill decree to the Sheriff, cause or procure the said Sheriff to arrest or take the plaintiff, as in the plaint alleged. A second defence traversed malice in the defendant.

The issues joined were:—

First—Whether at the time of the delivery to the Sheriff of the King's County of the civil-bill decree, in the first count of the summons and plaint mentioned, a sum exceeding £10 for debt, was due upon said decree?

Second—Whether the doing of all or any of the acts in the first count of the summons and plaint mentioned was malicious, and without reasonable or probable cause?

The case was tried before MONAHAN, C. J., at the last Summer Assizes for the King's County, when evidence was given on both sides, the material facts of which fully appear in the judgment.

At the close of the case, the CHIEF JUSTICE intimated his opinion to be, that the arrest complained of was justifiable, but ruled that the decree was not virtually delivered for execution until the 10th of March, when only £7. 3s. 6d. was due on foot thereof, and being of opinion that the question really in dispute between the parties was, whether, under the statute 11 & 12 *Vic.*, c. 28, the plaintiff in the civil-bill decree was justified in delivering it for execution when only £7. 3s. 6d. was due on foot thereof, he left the question of damages to the jury; and, by consent, reserved liberty for the defendant to apply to have the verdict entered for him, if under the said Act he was justified in having the plaintiff arrested; and that the Court should have power to amend the pleadings, so as to raise the question of the construction of the Act, for its determination.

The jury having accordingly found for the plaintiff, a condi-

tional order was obtained to have the verdict entered up for the defendant, pursuant to the leave reserved.

M. T. 1862.  
*Common Pleas*

ENGLISH

v.

DUNNE.

*J. T. Ball* (with whom was *Dames*) appeared to show cause.

The Act of Parliament which applies to this case is the 11 & 12 *Vic.*, c. 25. The analogous English Act is the 7 & 8 *Vic.*, c. 96. The English decisions are not applicable, because the language and policy of the English Act differ materially from the Irish Act. The English Act does not contemplate payments by instalments after judgment recovered; but that is not so in Ireland. Issuing the writ, means giving it to the Sheriff for execution. When the decree here was given to the Sheriff for that purpose, a sum less than £10 was due on foot thereof. The arrest therefore could not be justified.

*Battersby* and *Palles*, contra.

The words of the Act of Parliament cannot be unduly expanded. The execution in this case was a regular one, and sufficient to protect the defendant. The English and Irish Acts are in substance and object identical. The language of the Act cannot be so construed as to make the words "issuing" and "executing" have the same meaning. "Issuing" means suing out from the Court: *Ewart v. Jones* (a). Issuing the writ is the act of the Court, and not of the Sheriff. The intention of the Legislature is to be drawn from the words of the statute, and not from the nature of the object to be effected by it: *Fordyce v. Bridges* (b).

*Dames*, in reply.

The second and third sections of the Irish Act provide for cases of execution issued, but not executed, at the time of the passing of the Act. The second section points to two distinct periods when the sum due or to be recovered and paid shall be ascertained. If a civil-bill had been obtained for £40, and *before* the passing of the Act that sum was reduced below £10, the provision against arrest would have effect. The same principle ought to apply to

(a) 14 M. & W. 774.

(b) 1 H. of L. Cas. 5.

M. T. 1862. sums recovered *after* the passing of the Act. The same state of facts occurring *after* should have the same advantages as if they had occurred before the passing of the Act. A narrower construction should not be given to the first section of the Act, which includes cases after the passing of the Act, than to the second and third sections, which refer to cases before the passing of the Act.

*Common Pleas*  
ENGLISH  
v.  
DUNNE.

He referred to *Lessee Skuldham v. Boles (a)*; *Johnson v. Harris (b)*; and to an unreported case of *Delany v. Nolan*.

MONAHAN, C. J.

Nov. 21.

This case comes before the Court upon a conditional order to have the verdict had for the plaintiff entered for the defendant, or for a new trial. A portion of the order also is, that the pleadings be amended, so as to raise for adjudication the point in the case. The facts of the case are these:—The defendant Jeremiah Dunne, as the public officer of the National Bank, at the April Sessions of 1861, obtained a civil-bill decree against Mr. English the plaintiff, for the sum of £30, together with the sum of £1. 3s. 6d. for the costs and expenses of witnesses. Immediately after he obtained this decree he had it issued in the usual form, and signed by the Assistant-Barrister—namely, “that the plaintiff do recover from the defendant the said sum, together with costs,” “and the several “Sheriffs of the respective counties of Ireland are hereby commanded, notwithstanding any liberty within their bailiwick, to “enter the same, and take in execution the body of the defendant, “to satisfy the debt and costs.” It appeared before me at the trial, that some few days after the decree was so obtained, it was lodged with the Sheriff of the King’s County, at Tullamore, where Mr. English resided. The decree was given to the Sheriff, with directions not to execute it until he received further instructions. Accordingly the decree remained unexecuted until the month of March 1862. In the meantime an arrangement, though not a binding one, was entered into between Mr. English and the Local Manager of the Bank at Moate, that the latter would hold over

(a) 2 Ir. Com. Law Rep. 140.

(b) 15 C. B. 357.

the decree, provided Mr. English would pay the debt by instalments. Mr. English did so, until some domestic calamity occurred, which, it was alleged, prevented him continuing the payments. The result was that, in the month of February a sum of £13 still remained due; and Mr. Dowling, the attorney for the bank, was pressing for payment. Mr. English held communication direct with the manager of the bank at Moate, and paid to him as much as reduced the amount of the debt to £7. 3s. 6d.; and it was conceded that, at the time of plaintiff's arrest, the sum of £7. 3s. 6d. only was due on foot of the decree. Mr. Dowling, being unaware of the payments recently made to the local manager, and supposing that about £13 still remained due, intimated to the Sheriff, and also to Mr. English, that the decree should be executed. Mr. English informed him of the payments recently made, and that only about £7 remained due. Mr. Dowling and Mr. English both seemed to have been under the impression that, if a sum not exceeding £10 was due, the decree could not legally be executed. Dowling however called on the Sheriff, on Saturday the 8th March, and directed him to arrest the plaintiff. The Sheriff said that English had informed him that £10 was not due, and told him to be cautious. The result was, that, on the morning of Monday the 10th of March, the Sheriff, by the directions of Dowling, arrested Mr. English in his own house at Tullamore, and lodged him in gaol under this decree. English had not money to pay the amount of the decree at the time, but he communicated with his friends, and obtained it, and was discharged from custody on the following day, on payment of £7. 3s. 6d.; Dowling having learned in the meantime that that sum only was due.

Such being the facts, the question at the trial was, whether, under such circumstances, the defendant was liable for this as an illegal arrest? The pleadings contained several causes of action; and, there being no opportunity to settle the issues before a Judge in town, it was arranged to settle them before me on Circuit. It would appear by the record as if they had been settled, but no question turns upon this; because, at the trial, it appeared that English was discharged from custody immediately upon the pay-

M. T. 1862.

*Common Pleas*

ENGLISH

v.

DUNNE.

M. T. 1862.  
*Common Pleas*  
 ENGLISH  
 v.  
 DUNNE.

ment of £7. 3s. 6d. No question was agitated at the trial as to the arrest having been made for a larger sum than was actually due; the only question was, whether the arrest, at a time when only £7 were due, was justifiable or illegal, under the 1st section of the 11 & 12 *Vic.*, c. 28? It occurred to me at the trial that the pleadings did not exactly raise the questions that existed in the cause; as they were framed as if the question whether the agents of the bank acted maliciously was material in the cause. I thought malice immaterial; as, if the arrest was legal, it did not signify that it was made through malicious motives; and, if the arrest was illegal, it did not occur to me that the absence of malice could afford any answer to the action. Still, as the parties desired it, I left the question of malice to the jury, who were of opinion that the manager of the bank was not influenced by any malicious motive, but could not agree with respect to Mr. Dowling, the attorney of the bank.

I, being of opinion that the arrest was justifiable, still got the jury to assess plaintiff's damages, and find a verdict for the plaintiff; the plaintiff consenting that the verdict should be changed into a verdict for the defendant, and that the pleadings should be amended, to raise the question of law, if the Court should be of opinion that the arrest was justifiable. The question therefore is, £30 being due when decree was issued and signed by the Assistant-Barrister, but only £7 and some few shillings remaining due when the decree was delivered to the Sheriff for execution, whether the arrest was justifiable? I ruled at trial, that the decree was not in effect delivered to the Sheriff until he was directed to execute it. That depends upon the construction of section 1:—"No writ of *ca. sa.*, or other writ, process, or warrant, to arrest the body of any defendant in any action or suit (actions for malicious prosecution or for deceit, libel, slander, criminal conversation, seduction, or breach of promise of marriage, only excepted) shall be issued in Ireland, founded on a judgment, decree, or order of any of the Superior Courts of Law, or of any Inferior Courts, in Ireland, when the sum due or to be paid by or under such judgment, decree, or order, exclusive of the costs, if any, thereby recovered

"or ordered to be paid, shall not exceed the sum of ten pounds." M. T. 1862.  
Common Pleas  
ENGLISH  
v.  
DUNNE.

It occurs to us that it is impossible, having regard to this section, to give a different construction to it as to different descriptions of writs. It expressly provides that no writ of *capias ad satisfaciendum* shall be issued when a sum not exceeding £10 shall be due. No one can entertain a doubt that the time when a *ca. sa.* issues is when it passes from the officer of the Court, and is delivered to the plaintiff or his attorney. Therefore, in relation to a *ca. sa.*, the proper period to inquire what was due on foot of the judgment is, when it issues from the officer of the Court. That was the construction put upon this Act of Parliament in the case of *Shuldham v. Boles (a)*. In England, it has been held that the test of the right to issue execution against the person is, not what was due at the time of the issuing of the execution, but of the recovery of the judgment, except in the case of a judgment for a penal sum; and in that case it is the amount for which execution is issued. But the Court of Exchequer have been of opinion that, if the sum recovered were reduced to £10, at any time before the execution issued, the plaintiff was deprived of the writ of *ca. sa.*, and that the proper period of inquiring as to this was the time when it was issued from the Court. If so, what distinction can be found between a writ of *ca. sa.* and the writ of an Inferior Court? We think that none such exists. If then it be properly held that the time for inquiring as to the right to issue the writ, is the time when it leaves the office, let us see how far a civil-bill decree and a writ of *ca. sa.* correspond. The former, in the first part, is a judgment, and, in the second part, is an order to the Sheriff to take in execution. Bearing this in view, we find that the procedure under both in other respects is the same. Both must be delivered to the Sheriff. The Sheriff may execute both or either in person; or he may, at his own risk, grant a warrant to a bailiff; and, as in the case of a *ca. sa.*, so in the case of a civil-bill decree, the Sheriff may have it executed by a bailiff of his own, or by a special bailiff nominated by the plaintiff; or he may, as in the present case, if no warrant be issued, execute the writ in person, by arresting the defendant. This writ gave a clear authority to keep

(a) 2 Ir. Com. Law Rep. 140.



M. T. 1862.  
*Common Pleas.*

ENGLISH  
 v.

DUNNE.

the party in custody. However, in the present case no inquiry need be made as to what was done at the time of the delivery of the writ to the plaintiff; and it is equally immaterial to inquire what was done at the time of its execution. It might perhaps have been better if it had been expressly provided by the Legislature that no arrest should take place in respect of a sum not exceeding £10; but such is not the construction of this Act. We are of opinion that we should not make a distinction between two classes of writs; and therefore we think that the proper time of considering what was due with reference to the propriety of execution, was when the decree was issued, that is, when it was taken out from the Assistant-Barrister; and there is nothing unreasonable in that; because you then have the writ or decree which contains the amount due, and the authority to execute it: and in this case the indulgence of the plaintiff in giving time, should not take away from the original efficiency of the execution. We are also of opinion that the time of the issuing of the execution by the Assistant-Barrister was the proper time for considering its legality; and therefore we think that the arrest in this case was justifiable. During the argument, we were referred to a case tried before me at *Nisi Prius*; and no doubt Counsel was right in saying that, at *Nisi Prius*, I gave to the statute a different construction. I recollect that there a decree had been pronounced by the Recorder of Dublin, for £20 or £30, and a warrant issued to the Sheriff to arrest the party; the Sheriff went out of office, and the plaintiff applied to the incoming Sheriff to obtain a new warrant, and at the time of doing so a sum not exceeding £10 was due. In the hurry of *Nisi Prius*, I had not the same opportunity as I have had in the present case, of considering the question; and I was of opinion that the new warrant by a new Sheriff made it a case which came within the Act. I was under the impression that, when a change of Sheriffs took place, it was necessary to make a new application to the Recorder. Such, however is not the case. The change of Sheriffs does not affect the operation of the decree, nor does it render it necessary that the decree should be renewed. The decision made by me at *Nisi Prius* in that case is not one that I should now follow. With respect to the 2nd and 3rd sections of the Act,

there certainly are some expressions calculated to raise a doubt as to the true construction of the Act, but, in our opinion, not sufficient to alter the plain construction of the 1st section.

On the whole therefore our opinion is, that the arrest of the plaintiff under the civil-bill decree was justifiable; and we will therefore enter a verdict for the defendant; but the pleadings and issues must be amended, so as to raise the question we decide, in order that the plaintiff, if so advised, may be at liberty to appeal from our decision. Therefore, let the pleadings be amended; should the parties differ, I will settle the amendments and let the verdict be entered for the defendant. But, though defendant succeeds, he is equally responsible with the plaintiff for the confusion of the pleadings; and therefore each party must bear his own costs of this motion and of the conditional order.

M. T. 1862.  
*Common Pleas.*  
ENGLISH  
v.  
DUNNE.

### TAYLOR v. CLARKE.

Nov. 18, 20.

THIS was an application that Mr. H. Colles, the Taxing-master, be directed to review his taxation of costs, by disallowing to the plaintiff £10. 10s. 0d., being the amount of the fee paid to Mr. Whiteside, Q. C., as leading Counsel for the plaintiff, and £2. 13s. 4d., being the costs of the brief for the trial. It appeared, by the affidavits on

A retainer, on behalf of the defendant, was left at the Dublin residence of a Q. C., then absent in London, attending Parliament.

The cause being in the special jury list of causes for trial on Monday June 23rd, the plaintiff's attorney, not knowing of the defendant's retainer, sent a brief to London to the Q. C., who, in ignorance of the previous retainer, sent a reply that he would be in Court on the following Wednesday morning. The cause was unexpectedly called on Monday; and a postponement having been refused, was proceeded with, and concluded the following day. Counsel did not arrive until after its termination on Tuesday; and he was in Court the following morning; and subsequently returned the defendant's retaining fee. Plaintiff having obtained a verdict, the Taxing-officer allowed the above brief and fee on taxation against the defendant.—*Held*, on a motion to review taxation, that these items had been properly allowed, inasmuch as at the time of the delivery of the brief there was a *bona fide* intention on the part of the plaintiff's attorney that the Q. C. should attend the trial on behalf of the plaintiff, and a reasonable probability of his being able to do so; and that the fact of his not having attended did not alter the case.

*Held also*, that this Court had no jurisdiction to interfere between Counsel and their clients in a question of retainer, which must be settled by the Counsel themselves, guided by the opinion of the leading Members of the Bar.

M. T. 1862.  
*Common Pleas.*

TAYLOR  
 v.  
 CLARKE.

both sides, that notice of trial in this cause, which was an action of libel by one medical man against another, was served on the 6th of June, for the After-sittings, which were to commence on the 17th of June last. On the 7th of June, the law-agent of the defendant's attorney left a docket of retainer, with the usual fee of £2. 2s. 0d., at the residence of Mr. Whiteside, Mountjoy-square North, Dublin, with the housekeeper. Mr. Whiteside was then in London attending Parliament. The cause was entered in the special jury list, which was not to be taken up until Monday the 23rd; it stood low down in the list; and it was not expected to be called on for some days. On Saturday the 21st, the plaintiff's attorney telegraphed to London to Mr. Whiteside, to know whether he would undertake the case; and if so, to consider himself retained. Mr. Whiteside, in ignorance of the fact of the defendant's retainer having been previously left at his house in Dublin, replied in the affirmative; and thereupon the attorney sent him his brief and fee, which Mr. Whiteside acknowledged by post, and wrote to say that he would leave London on Tuesday morning, and would be in Court on Wednesday. The special jury list having been called on Monday, several causes were struck out; and the CHIEF JUSTICE having declined to postpone the hearing of this case, it proceeded in Mr. Whiteside's absence. The latter arrived on the following evening, and was in Court, as he had appointed, on Wednesday morning; but the trial had concluded the day before, the jury having found for the plaintiff, with £100 damages. After his arrival, he discovered, for the first time, the fact of the defendant's retainer having been left at his house; and he subsequently returned the fee which had been left therewith.

*Devitt* (with whom was Serjeant *Armstrong*), in support of the motion.

We admit that the Court have no jurisdiction over Counsel in questions of retainer; but it is submitted here that the brief in question was given out to Counsel under circumstances which incapacitated him from acting on it, and that it has not therefore been rightly charged against defendant. The schedule to the Common Law Procedure Amendment Act 1853 appears to recognise

two as the customary number of Counsel to be employed on a trial at Nisi Prius, but gives the Taxing-officer the power of allowing a third brief under special circumstances. It is not disputed that a third ought to have been allowed here, in case he had appeared, and given his services at the trial.—[MONAHAN, C. J. It is not suggested that at the time the plaintiff's retainer was sent he had notice of the previous retainer.]—In case Mr. Whiteside had appeared at the time, the defendant might have required him to return the plaintiff's brief, and to act for him. The docket of retainer was never returned, though the fee was. The rules of the Profession respecting retainers have been in a measure recognised by the Courts: *Baylis v. Grant* (a); *Lucas v. Peacock* (b); *Cholmondely v. Clinton* (c). The Courts ought not to recognise the practice of delivering briefs to Counsel out of the country.—[MONAHAN, C. J. If the brief had been sent to a place where the attorney knew that he could not have had the services of Counsel, that would be a different thing; but here that is not the case; and the question is, whether the plaintiff's attorney might not have *bona fide* believed that he might have had the services of Mr. Whiteside?]—Mr. Whiteside assured the plaintiff's attorney that he could not be in town until the evening of Tuesday, which was the second day of the trial of the special jury causes; he was not in Court until the 25th. As between party and party, the brief ought not to be allowed.

M. T. 1862.  
Common Pleas.  
TAYLOR  
v.  
CLARKE.

*J. Clarke, contra.*

As to the first point, that Mr. Whiteside ought not to have accepted plaintiff's brief, it has been conceded that the Courts have no jurisdiction to interfere. It was for himself and the other Members of the Profession to decide the question whether he was bound to act upon the retainer which was left at his house, or that which came to his hands. The defendant's attorney has accepted the retaining fee returned by Mr. Whiteside. He might have refused to take it back. A very similar case arose in this country, when

(a) 2 M. & K. 306.

(c) 8 Beav. 1.

(b) 9 Ves. 273.

M. T. 1862. *The Queen v. O'Connell and others* was about to be tried. A  
*Common Pleas.* retainer was sent to Mr. *Napier*, for the Crown, to London, and one  
 TAYLOR for the traverser was left here; and it was held that he was bound to  
 v. act upon that which first came to his personal knowledge. With  
 CLARKE. respect to the delivery of the brief, there was a reasonable expectation, from the position of the cause in the list, that it would not be called on until Wednesday morning; and an application was made to the Court for postponement. There is no reason why a brief should not be delivered in London, if there be a *bona fide* intention and a reasonable probability that Counsel may attend the trial.

Serjeant *Armstrong*, in reply, cited *Swinfen v. Lord Chelmsford* (a); *Sharp v. Ashby* (b).

*Cur. ad. vult.*

MONAHAN, C. J.

Nov. 20. This application has been rested upon two distinct grounds. With reference to the first, namely, the question of retainer, we are clearly of opinion, that we have no jurisdiction to interfere between Counsel and their clients; any questions that arise should be settled by the leading Members of the Bar. It is for the Counsel himself to say whose retainer he is bound to accept; if Mr. Whiteside had got the plaintiff's retainer in Court, and, upon his return home, had found the defendant's retainer at his house in Mountjoy-square, and had decided to act upon the retainer of the plaintiff, and the opposite Counsel had, at *Nisi Prius*, objected to his appearing on the plaintiff's behalf, the Court could not interfere, and the Taxing-officer would have been bound to allow his fee on the taxation of costs.

Then arises the next question, whether the fact of Mr. Whiteside not having attended at the trial, disentitles his client to charge the amount of his fee against his adversary. It being an admitted fact that the brief and fee were sent to Mr. Whiteside, with the *bona fide* expectation of having his services at the trial. It was possible that, according to the terms of the notice of trial, the cause might have been tried on a day prior to that on which the brief was

(a) 5 H. & N. 917.

(b) 1 Dow. & L. 998.

sent to Counsel; but in consequence of the intimation which I gave to the parties, that the special jury list would not be taken up until the 23rd of June, the case stood in the list of that day, and four or five other cases stood in the same list before it. If those cases had not been settled, it is probable that they would have occupied two or three, or even four days. It appears also that when Mr. Whiteside got his brief, he wrote saying that he expected to be in Court on Wednesday morning, and they evidently thought that the case would not come on before that day. However, owing to the accidental circumstance that the prior cases were all settled, this case was called on on Monday, and occupied the whole of that day and part of Tuesday. Mr. Whiteside came to town that evening, but the case had then concluded. And thus the question arises, whether if a brief be delivered to Counsel for the *bona fide* purpose of attending a certain trial, and he receives that and the fee, with the expectation of being able to attend, will the circumstances which I have just mentioned, disentitle the client to tax the fee against the opposite party? In point of fact, the only person who is injured here by the non-attendance of Counsel, is his own client; but the question is, whether he having got a verdict is not entitled to include this fee in the taxation of his costs? We are of opinion that we cannot interfere, in this case, with the allowance of this fee; unless we establish, as a general rule, that the brief and fee for Counsel shall not be taxed in any case, unless Counsel actually attend at the trial. If we were prepared to go to that extent, it would of course decide the present case; but we cannot lay down such a rule, knowing as we do that both at Westminster and here it frequently happens, that though two or more Counsel are instructed to appear in a particular case, yet that, from being actually engaged in another Court, they are unable to attend to the particular case; yet it never has been supposed, as suggested, that the party should lose not only the assistance of his Counsel, but also be unable to tax against his adversary the fee paid to him. This is a motion altogether of the first impression, and must be refused with costs.

M. T. 1862.

Common Pleas

TAYLOR

v.

CLARKE.



# APPENDIX.

## CHAMBERLAINE v. DRUMGOOLE.

(*Queen's Bench*).

M. T. 1861.

*Queen's Bench*

Nov. 7.

MOTION on behalf of John Drumgoole, executor of the defendant, that the plaintiff be directed to proceed with the action, pursuant to the provisions of the Common Law Procedure Act 1856, s. 93.

The action was brought against the defendant, Patrick Drumgoole, as executor of Thomas Neary, deceased. The first count of the plaint stated that the defendant was executor of Patrick Neary, deceased, and that, as such executor, he was indebted to the plaintiff in the sum of £18. 9s. 9d., for money payable by the defendant, as such executor, to the plaintiff, for goods sold and delivered by the plaintiff to the said Thomas Neary. The second count sought to charge the defendant, as such executor, on a bill of exchange, accepted by the said Thomas Neary. The plaint also contained the common money counts.—Defence, that the defendant is not, and never was, the executor of the said Patrick Neary, as in the plaint alleged. Issue thereon.

It appeared, by the affidavits filed in support of the motion, that the writ of summons and plaint was filed on the 21st of January 1857; that notice of trial was served on the 27th of February following, for the then ensuing Drogheda Assizes, but was afterwards withdrawn; that the defendant died on the 19th of December 1857, and that probate of his will was granted to the applicant, on the 9th of February 1858, and that the attorney for the defendant died on the 24th of October 1860. In the affidavit which was filed in reply, it was stated that the action was brought against the defendant as executor *de son tort* of Patrick Neary, and that he the plaintiff was advised and believed that he could not safely go to trial without the evidence of the defendant.

*Heron*, in support of the motion.

This application is made by the personal representative of the

Action on the common money counts, and on a bill of exchange, against the executor, as such, of a deceased testator. The defendant died after the plaintiff had withdrawn the notice of trial. Nearly four years after the defendant's death, his executor moved the Court to direct the plaintiff to proceed with the action, pursuant to the Common Law Procedure Act (Ireland) 1856, s. 93. Motion refused, on the ground that the action did not survive against the personal representative of the deceased defendant, within the meaning of the Common Law Procedure Act (Ireland) 1856, s. 158, and the Common Law Procedure Act (Ireland) 1856, s. 93.

Procedure Act (Ireland) 1856, s. 93.

*Quere.*—Whether, in a case which comes within the latter section, the motion is grantable as of right?

a



M. T. 1861. defendant, who seeks to recover the costs expended by his testator  
*Queen's Bench* in defending an action which was afterwards abandoned by the  
 CHAMBER- plaintiff.  
 LAINE

v.  
 DRUMGOOLE

*H. Fitzgibbon, contra.*

It is discretionary with the Court to grant this motion. The words of the 93rd section of the Common Law Procedure Act 1856 are, that the party "*may* apply by notice to compel the plaintiff" to proceed. That section confers on defendants a privilege reciprocal to that extended to plaintiffs by the 158th section of the Act of 1853. Applications under the latter section are to the discretion of the Court. The delay which has occurred in bringing forward this application is sufficient to disentitle the party to the indulgence which he seeks. No step has been taken in the case since the year 1857; and the present applicant was in a position to come to the Court in the month of February 1858: the 178th General Order.—[FITZGERALD, J. Can you show how you have been prejudiced by this delay?—It is stated in our affidavit that we cannot safely go to trial without the evidence of the defendant, who is now dead.—[FITZGERALD, J. We cannot act upon a suggestion of that nature. If this application had been made immediately after the death of the defendant, what opposition could you have made to it?—I admit I would then have been in a worse position. Again, the plaintiff has no reciprocal right in this case to file a suggestion under the 158th section of the Act of 1853. That section only applies to cases where "the action survives." The defendant was sued as executor *de son tort*; and such an action will not survive as against his executor.

*Heron, in reply.*

With regard to the question of delay, the position of the applicant should be taken into account. He applies, as personal representative of the defendant, to protect his testator's estate, and should be entitled to more indulgence than if the application had been made by the original defendant. It lies on the plaintiff to show how he has been prejudiced by the delay. He says he cannot safely go to trial without the evidence of the defendant; but notice of trial was withdrawn, a considerable time before the defendant's death. Again, it is argued that the action was not one in which a suggestion could have been filed under the 158th section of the Act of 1853, inasmuch as it was brought against the defendant as executor *de son tort*. But nowhere on the record does it appear that the defendant was sued as executor *de son tort*. The simple

issue was, whether the defendant, Patrick Drumgoole, was executor of Thomas Neary, deceased? The test, as to whether the action survives in the present case, is, out of what fund would the judgment have been satisfied? Now, on the pleadings, judgment should have gone against the goods of Patrick Drumgoole; and, in the event of his death, there is no one against whom execution could have issued, except the present applicant.

M. T. 1861.  
*Queen's Bench*  
 CHAMBER-  
 LAINE  
 v.  
 DRUMGOOLE

LEFROY, C. J.

In my opinion, my Brother FITZGERALD has met the only difficult point in the case; otherwise I should have had to make the order which was applied for. I should have given it generally, where the law has not fixed any period of limitation within which the defendant must proceed, and where the Legislature has given him a right to do so. The Statute of Limitations shows that, in point of law, the party has an available right, unless the Legislature has limited the time within which he is to proceed. There may be circumstances of difficulty which would govern the discretion of this Court, and render it most inconvenient to grant the order. But, otherwise, a party coming after a lapse of time is not thereby barred. But the circumstances of this case are such that the right really does not survive to the defendant. Therefore, the reciprocal right cannot exist. The parties must be placed so that the Act should operate reciprocally for the advantage of the representatives of both parties.

O'BRIEN, J., concurred.

HAYES, J.

I concur in the judgment of the Court. There is, I think, no doubt but that this is not a case within the 93rd section of the Common Law Procedure Act (Ireland) 1856, which applies only to a certain class of cases, viz., where the action survives to or against the personal representative of the deceased; and this is not one of that class. With respect to the other ground, I am rather disposed to come to a different conclusion from the other Members of the Court; for, assuming that this case is within the 93rd section of the Act of 1856, I should be disposed to refuse the motion, being of opinion that the order is not grantable as of right, but that we are to exercise our judicial discretion, and say whether, under all the circumstances, we shall or shall not make the order? Now, for the guidance of our judicial discretion, we may very fairly have regard to the 178th General Order,

M. T. 1861.  
*Queen's Bench*

CHAMBER-

LAINE

v.

DRUMGOOLE

even though it does not in terms apply to the present case. The principle of that Rule is that, when parties have lain by for two years or more, without a compromise pending, and neither party has thought fit to urge the other forward, then, before any further proceeding be taken, there shall be a special order of the Court, made at the instance of the party who desires to go on, and upon notice given to his adversary. Mr. *Heron* says that he is entitled to carry the motion, on merely announcing the fact that his client is the personal representative of the defendant; and *that*, at the end of three years, or, indeed, of any number of years, and without any affidavit explanatory of the circumstances which have caused the delay, and admitting that he was, during the whole period, fully aware of all the circumstances. The view which I take of the Act is, that it lies on the party bringing forward the motion, and who has thus lain by, as a part of his case, to satisfy the Court as to the reasons which have caused his delay, and that he has no right to throw on the other party the onus of showing how he has been prejudiced by the delay.

I have thought it proper to say so much, not because it was necessary to the decision of this particular case, but lest it should be erroneously supposed that the opinion expressed upon it by other Members of the Court was the unanimous opinion of the Court.

FITZGERALD, J.

Concurring, as I do, in the result at which the other Members of the Court have arrived, I base my judgment upon this, that this is not an action which survives against the personal representative of the deceased defendant, within the meaning of the 93rd section of the Common Law Procedure Act (Ireland) 1856, and the Common Law Procedure Act 1858, s. 158. That is the sole ground of my judgment. Upon the other point it is not necessary to decide; and I offer no opinion upon it. I shall only say that, if it had been necessary to decide it, my opinion would probably not have been in accordance with that expressed by my Brother HAYES.

H. T. 1862.  
*Queen's Bench*

CATHERINE HUGHES v. VALENTINE BROWNE,  
 ALEXANDER BEYTAGH and others.\*

MOTION to set aside a defence as embarrassing.

Jan 25.

The action was in ejectment for non-payment of rent. The plaintiff averred that the defendant holds one undivided fifth part or share of certain lands in the county of Galway, as tenant to the plaintiff, at the yearly rent of £18. 9s. 2d., and that the sum of £110. 15s., being for six years' arrears of such rent, due and ending, &c., is due to the plaintiff.

Ejectment for non-payment of rent, claiming six years' arrears. Plea: "That the rent of the said premises is not in arrear; and that the defendant discharged the said rent, and every part thereof, to the said plaintiff, before the commencement of the action."—*Held*, a bad plea, because it did not go on to show how the rent had been discharged.

Defence:—"That the rent of the said premises is not in arrear; and that the defendant discharged the said rent, and every part thereof, to the said plaintiff, before the commencement of this action, and therefore," &c.

Indorsement of particulars of discharge.

By indenture of lease, made in the year 1844, between the said defendant Alexander Beytagh of the one part, and John Hughes, son of the plaintiff Catherine Hughes, of the other part, the said defendant Alexander Beytagh, at the special instance and request of the said Catherine Hughes, demised the house and demesne lands of Cappagh, being portion of the lands mentioned in the summons and plaint, to the said John Hughes, at the yearly rent of £60, to hold for a term still unexpired; and the said plaintiff Catherine Hughes, in consideration of the lease so made by the defendant Alexander Beytagh to the said John Hughes, her son, agreed with the said defendant Alexander Beytagh, and undertook, during the continuance of the term in the lease so made to the said John Hughes, not to ask, sue for or demand the yearly rent of £18. 9s. 2d., payable to her as her one-fifth share of £100, late Irish currency, reserved by a certain lease, bearing date the 9th day of October 1799, for lives renewable for ever; and, by reason of such agreement, the rent from year to year accruing to the said Catherine Hughes was discharged, and no arrear thereof is now due.

*Beytagh*, for the motion.

In substance, that is meant to be a defence of payment, so that the defendant is bound to indorse the particulars of payment. But the indorsement is in itself a separate and distinct plea, containing facts which, though capable of being traversed, cannot be traversed when inserted in the indorsement. If the defence and indorsement

\* Before O'BRIEN, HAYES and FITZGERALD, JJ.

H. T. 1862.  
*Queen's Bench*  
 HUGHES  
 v.  
 BROWNE.

together do not amount to a plea of payment, they are nothing at all; for, otherwise, the word "discharged" is so ambiguous that the defence would be set aside.—[FITZGERALD, J. The defence contains no allusion to any indorsement.]—No; and, without a reference, the defence cannot incorporate the indorsement with itself: Common Law Procedure Act (Ireland) 1853, s. 41. Therefore, the facts have not been pleaded in such a way as would enable us to take issue upon them. This defence must be set aside, on the authority of *Roche v. Coleclough* (a).

*Kernan* (with him *J. S. Greene*), contra.

This defence does not even purport to be a plea of payment; it is a discharge.—[FITZGERALD, J. You should show *how* you have discharged the claim.]—The Common Law Procedure Act (Ireland) 1853, s. 41, enacts, no doubt, that, in case a defence of payment or set-off is pleaded, the particulars of payment shall be indorsed and incorporated by reference. But it does not enact that such particulars shall be indorsed in any other case. The plaintiff requires the defendant to plead matter of evidence. This defence raises the single issue, whether the rent is in arrear? The particulars of discharge need not have been indorsed at all; for this is an action of ejectment, which is not a *personal* action: *Swanton v. Gould* (b); and the Common Law Procedure Act (Ireland) 1853, s. 41, requires particulars to be indorsed only in *personal* actions. Section 198 requires, no doubt, that "if the fact of the rent being due" is in dispute, such defence shall be indorsed with the particulars of any payments. That alludes only to the fact of rent being due being in dispute, where the defence is payment; but this is not a defence of payment, and the indorsement was given only to let the plaintiff have notice of the mode in which we propose to prove that the rent is not in arrear. If we had put these facts on the face of the plea, it would have been said that this was an equitable defence, which does not apply to actions of ejectment: *Neave v. Avery* (c).—[O'BRIEN, J. Even assuming that you are right on the point with respect to the indorsement, do the facts stated in it constitute a discharge of the rent?—The question whether this defence is good in point of law cannot be gone into upon this motion.

O'BRIEN, J.

We are all of opinion that this defence is embarrassing, but that the defendant should have liberty to amend as he may be advised.

(a) 5 Ir. Com. Law Rep. 538.

(b) 9 Ir. Com. Law Rep. 234.

(c) 16 C. B. 328.

We cannot, for the reasons which we have already mentioned, look at the indorsement on the defence. One of those reasons is, that the defence does not refer to and incorporate with itself the indorsement. But further, upon reading the indorsement carefully, it is very hard to make out what it is. If it is meant to be a discharge by payment, it is bad, for the reason given by Greene, B., in the case cited during the argument; and also, there is an omission to identify with the sum of £18. 9s. 2d., which the plaint claims as the yearly rent, the sum of £18. 9s. 2d. which is sought to be set off by the indorsement.

H. T. 1862.  
*Queen's Bench*  
 HUGHES  
 v.  
 BROWNE.

Then, the defence is that the rent is not in arrear; and that the defendant discharged the said rent, and every part thereof, to the plaintiff, before the commencement of this action. That is not sufficient: the defence should have gone on to show *how* the rent was discharged.

HAYES, J.

This is an ingenious defence; and if it were held good, I think it would soon become of universal adoption; for no person would be so stupid as to put in a plea of payment, and bind himself by an indorsement of particulars of the payment, if he could simply allege, without more, that he discharged the rent to the plaintiff, before action brought. The Common Law Procedure Act 1853, s. 198, enacts that every defendant in ejectment for non-payment of rent shall set forth in his defence the substantial ground thereof. Now having regard to what I take to be the true meaning of the Legislature, as derived not only from the language of this section, but of the form in the schedule which is there referred to, I am of opinion that the ground of defence is not sufficiently set forth, and, for that reason, that it should be set aside, unless the defendant elects to amend.

FITZGERALD, J.

I quite concur in the opinion of my Brothers O'BRIEN and HAYES, that this defence cannot be maintained. I only wish to observe upon the assertion which the Counsel for defendant has made, that it has been doubted whether the provisions of the Common Law Procedure Act 1853, as to equitable defences, applied to actions of ejectment. There never has been any substantial doubt on the subject. Counsel cited a case of *Neave v. Avery* (a), to show that the Common Law Procedure Act, in England, does not apply to actions of ejectment, as far as regards equitable defences. But that decision went upon the use in the

(a) 16 C. B. 328.

H. T. 1862.  
*Queen's Bench*

HUGHES

v.

BROWNE.

English statute of the word "pleadings" in the sections referred to. In England, there are no "pleadings" in actions of ejectment. The Common Law Procedure Act left the forms of proceedings in actions of ejectment unchanged. My attention was called to that decision when I had the charge of the Common Law Procedure Amendment Act (Ireland) 1856 in the House of Commons; and the answer given was, that that decision did not apply to this country, because our system was different from that in England. The Common Law Procedure Amendment Act (Ireland) 1858 has created "pleadings" in actions of ejectment in Ireland; and, by its 127th section, all the previous provisions with respect to personal actions were made applicable to actions of ejectment, unless where there was some provision to the contrary. Therefore, there never has been any substantial doubt on the subject; and I have no hesitation in agreeing in the judgment of the Court, that this defence is on every ground bad.

#### KATE O'RORKE v. ELIZA M'DONNELL.

Jan. 18, 17.

In an action of contract, both parties to which resided within the same civil-bill jurisdiction, and which was brought to recover five and one-half years' arrears of salary, the plaintiff obtained £8 by verdict, besides £45 which the defendant lodged in Court, under a plea of tender, before action commenced, but did not apply to the Judge who tried the case for a certificate that it was a case fit to be tried in a Superior Court. The Taxing-master, accordingly, refused to tax the plaintiff's costs upon the higher scale. Upon appeal, that ruling was reversed by the Court (FITZGERALD, J., dissenting).

THE plaintiff brought this action to recover the sum of £110 sterling, money payable by the defendant to the plaintiff, for work done, services performed and materials provided by the plaintiff for the defendant, and at her request; and for wages due by the defendant to the plaintiff; and for money found to be due from the defendant to the plaintiff, on an account stated between them; and for a balance of salary due by the defendant to the plaintiff.

Indorsement of particulars :—

"To salary and wages, for work done and services performed, from 1st of November 1855 to 1st of May 1861, at £20 per year ... .. £110 0 0"

The defendant pleaded that the work done, and services performed and materials provided by the plaintiff for the defendant, and the wages and salary due by the defendant to the plaintiff, were of the value of £55, and no more; and that the only money found to be due from the defendant to the plaintiff, on accounts stated between them, was said sum of £55, and no more. And, as to the sum of £10, parcel of the said sum of £55, defendant says that the plaintiff,

before and at the commencement of the suit, was, and still is, indebted to the defendant in an amount equal to said portion of plaintiff's claim, for goods sold and delivered by the defendant to the plaintiff; and for money lent by the defendant to the plaintiff; and for money received by the plaintiff for the defendant's use; and for money found to be due from the plaintiff to the defendant, on accounts stated between them, which amount the defendant is willing to set off against so much of the said sum of £55. And, as to the sum of £45, being the balance of said sum of £5, defendant says that, before action brought, she tendered and offered to pay the plaintiff said sum of £45, which the plaintiff refused to accept; and the defendant says she has always been ready and willing, and still is ready and willing, to pay the said sum of £45 to the plaintiff, and that she brings here into Court the said sum of £45, which is sufficient to satisfy the said balance of plaintiff's demand.

H. T. 1862.  
*Queen's Bench*  
 O'BORKE  
 v.  
 M'DONNELL.

Particulars of set-off:—

" Shop goods and money of defendant, taken by the plaintiff									
for her own use, during the years 1856, 1857, 1858,									
1859, as admitted by her, in the month of December									
1860	...	...	...	...	...	...	...	£9	0 0
Like, in the year 1861...	...	...	...	...	...	...	...	1	0 0
								<hr/>	
								£10	
								0 0"	

To the plea of set-off the plaintiff filed a replication, and said that no goods were sold and delivered by the defendant to the plaintiff, as therein alleged; and that no money was found to have been lent by the defendant to the plaintiff, as therein alleged; and that no money was received by the plaintiff for the defendant's use, as therein alleged; and that no accounts were stated between plaintiff and defendant, as therein alleged.

The issues were—first; whether the defendant is indebted to the plaintiff on foot of the claims in the several paragraphs of the summons and plaint contained, in any, and, if any, in what amount, over and above the sum of £45, lodged in Court by the defendant, in satisfaction of this action?

Second; whether the plaintiff's replication is true in substance and fact?

On the first issue, the jury found a verdict for £8 for the plaintiff, but found for the defendant on the second issue.

The plaintiff did not apply to the learned Judge who tried the case for a certificate that the case was a fit one to be tried in a Superior Court, although both parties resided within the same civil-bill jurisdiction. The Taxing-Master refused to tax the plaintiff's



H. T. 1862. costs on the higher scale; and this motion was instituted by way of  
*Queen's Bench* an appeal from that ruling.

O'RORKE

v.

M'DONNELL.

*T. Harris*, for the motion.

The plaintiff has recovered more than £20; for the sum lodged in Court must be included in the verdict: *Evans v. Great Southern and Western Railway Company* (a). That case, however, was decided independently of the plea of tender; and *Hughes v. Guinness* (b) shows that the plaintiff is entitled to get costs. That decision is as applicable to a case in which a tender has been pleaded as to one of mere lodgment in Court.

Counsel also cited *Crosse v. Seaman* (c); *Cooch v. Maltby* (d); *James v. Vane* (e); *Dixon v. Walker* (f). The latter case is not hostile to the others, because the plaintiff there had entered a *nolle prosequi*, as to the amount tendered.

*R. Ferguson*, contra.

The effect of a tender, and a lodgment in pursuance of it, differs essentially from the effect of a lodgment merely. In actions of contract, a party who can safely accept the portion tendered, without giving a discharge for the whole debt, must do so, and sue in the Inferior Court for the balance, if both parties reside within the civil-bill jurisdiction. If the plaintiff does not do so, but goes on for the balance in the Superior Court, and there recovers less than £20 beyond the sum tendered, the Common Law Procedure Act (Ireland) 1856, s. 97, provides that he shall not get any costs, unless the Judge gives the requisite certificate. *Evans v. Great Southern and Western Railway Company* decided that the plaintiff might have taken out the money lodged, without prejudicing his right to sue for the balance in the Civil-bill Court. *Hughes v. Guinness* was determined on a wholly different ground, namely, that the money lodged had been recovered by the pressure of the action. A plea of tender admits that the defendant owes the plaintiff the sum tendered, and that he is ready to pay it, without condition, qualification or receipt. From that moment, the sum tendered is, as it were, struck out of the plaint altogether. No controversy regarding it remains; and the plaintiff is not entitled to harass the defendant, by suing for the balance in the more expensive

(a) 5 Ir. Jur. 329.

(b) 4 Ir. Com. Law Rep. 314.

(c) 10 C. B. 884; S. C., 11 C. B. 524.

(d) 23 Law Jour., N. S., Q. B., 305.

(e) 29 Law Jour., N. S., Q. B., 169.

(f) 7 Mees. & W. 214.

jurisdiction: *Dixon v. Walker*; *Lafone v. Smith* (a); *James v. Vane*. The tender is always made *on account* of the demand, leaving the plaintiff free to sue for the balance, if he thinks that the sum tendered was not sufficient. The tender reduced the entire demand by the sum tendered; and, this being a severable demand, the plaintiff should have sued in the Court below for the balance.

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

*T. Harris* was heard in reply.

*Cur. ad vult.*

FITZGERALD, J.

In this case, in which Kate O'Rorke is plaintiff, and Eliza M'Donnell is defendant, Mr. *Harris*, on behalf of the plaintiff, moved the Court, by way of appeal from the ruling of the Taxing-officer, who, on the ground that the plaintiff had *recovered* a sum of less than £20, held that she was not entitled to get full costs, and had, accordingly, declined to tax her costs on the higher scale. The question arose on the 97th section of the Common Law Procedure Amendment Act (Ireland) 1856, by which it is provided that if, in any action of contract, with certain exceptions, where the parties reside within the jurisdiction of the Civil-bill Court of the county in which the cause of action has arisen, the plaintiff shall *recover*, exclusively of costs, a sum less than £20, as, &c., . . . the plaintiff in any such action shall not be entitled to *any* costs; and then a power is given to the *Judge* at the trial to certify, on the back of the record, either that the case was one which could not be tried in the Civil-bill Court, or that, although within the jurisdiction of the Civil-bill Court, it was, nevertheless, a fit case to be tried in one of the Superior Courts; and a like power is given to the Court or a Judge to make an order, to the like effect, upon motion.

Jan. 17.

Accordingly, when this case came for taxation before Mr. Gartlan, he was of opinion that the plaintiff had *recovered* a sum less than £20; and, as she had not a certificate from the Judge, the Taxing-officer disallowed the plaintiff her costs. The question now is, whether the Taxing-officer was right in coming to that decision?

It will be observed that the 97th section, which I have read, is in substance a re-enactment of a similar provision in the Civil-bill Act (14 & 15 *Vic.*, c. 57, s. 40), which had been repealed by the Common Law Procedure Act (Ireland) 1853, s. 3, and

(a) 4 H. & N. 158.

H. T. 1862.  
*Queen's Bench*  
 O'ROKKE  
 v.  
 M'DONNELL.

schedule A. That Act, by its 243rd section, had substituted a provision for the repealed section of the 14 & 15 Vic., c. 57, which allowed a plaintiff to get half costs, and did not deprive him of costs altogether. The question, then, in the present case is this—did the plaintiff “*recover*, exclusive of costs, a sum less than £20?” Those are the words of the statute, and this is the question which we have now to determine; because, if the plaintiff *recovered* less than £20, then (this action being one of contract, and, therefore, within the Common Law Procedure Amendment Act, Ireland, 1855, s. 97), she is disentitled to costs; whereas, if she has recovered a sum of £20, the decision of the Taxing-officer is wrong, and the plaintiff is entitled to get her full costs.

In order the better to understand this question, it is necessary to refer to the form of the judgment upon the verdict, and to the pleadings in the case. The writ of summons and plaint consists of a claim for £110 sterling, payable by the defendant to the plaintiff for work done, services performed and materials provided; for wages, for money found to be due, upon an account stated, and for a balance of salary; in short, the plaint consists of the common counts applicable to a demand of that nature. By the indorsement of particulars, the plaintiff claims a sum of £110 for salary and wages, and work done and services performed, from the 1st day of November 1855 to the 1st day of May 1861, at the rate of £20 per annum. To that writ of summons and plaint the defendant took defence, and pleaded as follows; first, she says, that the work done and services performed, &c., were of the value of £55, and no more; and that the only money found to be due, on accounts stated between them, was the said sum of £55, and no more. I shall take that portion of the defence, as to all of the demand, except £55, as being equivalent to the old plea of *non-assumpsit* or *nil debet*. The defendant next pleaded a set-off for £10, parcel of the £55; and, as to the residue of that sum, £45, she pleaded the ordinary defence of tender before action brought. We may take it, therefore, that the action proceeded upon three defences; first, *nil debet* as to all except £55; secondly, as to all of that £55, except £10, a tender before action brought; and, thirdly, a plea of set-off as to that £10. Accordingly, upon the defence of tender, the defendant, in conformity with the old Common Law rule, and with the new practice under the 75th section of the Common Law Procedure Act (Ireland) 1853, to which I shall presently advert, paid into Court the sum of £45, which she said she had tendered before action brought. The plaintiff filed a single replication traversing the alleged set-off; and furnished to the defendant, and the defendant accepted, two issues, namely, whether the plain-

tiff's replication was true? and, secondly, whether the defendant was indebted to the plaintiff in any, and, if any, in what sum, over and above the sum of £45 lodged in Court by the defendant? The case went down to be tried upon those two issues only, namely, whether the defence of set-off was well-grounded? and whether the plaintiff was entitled to receive from the defendant anything beyond the sum of £45 tendered and lodged in Court by the defendant?

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

It will be observed that, upon these pleadings, the plaintiff, if she wished to controvert the effect of the tender, might have replied, confessing and avoiding the tender; or, if she wished simply to deny the fact of the tender, might have taken issue on the allegation of tender. The plaintiff, however, passed by the plea of tender, and took issue only upon the other pleas.

The sum of £45, which was lodged, on the plea of tender, on the 12th of July 1861, was, on the 26th of the same month, drawn out by the plaintiff, who then gave for it the ordinary receipt in these terms:—"Queen's Bench office. Received from the Master of this Honorable Court the sum of £45 sterling, being the sum lodged in the Bank of Ireland, in the name of the said Master, to the credit of this cause.—Dated this 26th of July 1861.—£45."

The case went down to trial, and was tried before me at the last Summer Assizes at Nenagh. At the trial, my attention was not called to the fact that no issue had been taken on the plea of tender; and evidence was given, upon the part of the defendant, which I would not have received if my attention had been called to the absence of such an issue. That evidence was to the effect that this tender had been made on two different occasions. I have since looked at my book, and find that, on the second occasion on which the tender was so made, the defendant's attorney brought the precise sum of £45 with him in bank notes; and proof was given that an unconditional and proper tender had been made to the plaintiff in person, and to her attorney, and refused. The trial proceeded, and the plaintiff recovered a verdict for £8 beyond the sum lodged in Court. There was no controversy about the defendant's right to set off the sum of £10; so that, in one way or another, the plaintiff obtained a sum of £63, namely, the £45 which was tendered originally, and lodged in Court in pursuance of the plea of tender, the set-off of £10, and £8 recovered by verdict. The plaintiff admitted the tender, admitted the set-off; and I observe that, at the trial, the controversy was, whether, over and above the sums tendered and set off, the plaintiff was entitled to receive any further sum? Accordingly, upon that issue going to the jury, the plaintiff recovered a sum of £8 beyond those sums, out of the balance of the sum

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

of £110 which she originally claimed. The judgment, as entered on the *postea*, runs as follows:—"And the jury found for the plaintiff, and assessed her damages to £8 over and above the sum of £45 lodged in Court, with sixpence for costs. Therefore, it is considered, by the Court of Queen's Bench, that the said Kate O'Rorke do *recover* against the said Eliza M'Donnell the sum of £8 sterling, with sixpence for her costs, so found by the jury aforesaid, together with £—— for costs of increase, making together the sum of £——." If this case is to be determined upon the state of facts, and on the pleadings as they came before the Taxing-officer of the Court, in the first instance, it would seem beyond controversy that the plaintiff had *recovered* but £8, and not £45; and, accordingly, that judgment had been given for the sum of £8 only. But it was said that this view was too narrow and technical; for that, in substance, the plaintiff had instituted her action to *recover* £63; as to £10 only of which, on the plea of set-off, she had failed, but that she had actually *recovered* £45, and £8 beyond that sum; so that the result of the whole action proved that she had *recovered* more than £20, and was, in consequence, entitled to get full costs; for that £53 had been recovered by force of the action, and that the *recovery* of a sum beyond that tendered, being a portion of the same demand, had the effect of defeating the tender altogether—that the tender was thereby negatived and made nought, since it appeared that the plaintiff was entitled to *recover* a larger sum than that tendered, showing that the sum tendered had been insufficient. That the £55 was due, at the time of action brought, there was no controversy; but it is a different question whether the action was maintainable for it. It was also said that a tender is no bar to the demand. That proposition is unquestionably true; and great stress was laid upon the judgment of Wightman, J., in the case of *Cooch v. Maltby* (a), as supporting that view. But it is equally true that, though a tender is not a bar to the demand, still it is a defence to the action. Though, technically, it is pleaded in bar to the recovery of further damages, yet usage and experience shows us that a tender, either of the whole or of a part of the sum demanded, is, if unanswered, either *pro tanto*, or to the whole extent of the demand, a good defence to the action, although it is not a bar to the demand. We must now consider the nature and requirements of the plea of tender. A plea of tender admits that the plaintiff has, at the time of the tender, a well-founded demand for a certain sum, which was never controverted by the defendant; for the plea of tender must aver

(a) 23 L. J., N. S., Q. B., 305.

that the defendant was always ready to pay the sum tendered. It is of the very essence of the plea of tender that it contains this unequivocal admission, and it must be pleaded with the *toujours prist*. We find too, that, in addition to the plea of tender having this distinctive character, the defendant is bound also, and forthwith, to bring the money into Court, ready to be paid to the plaintiff at any time when the plaintiff chooses to take it. This must be done, because the plea of tender is an admission of the justness of the plaintiff's demand, and contains an averment that the defendant has always been ready to pay the money. Such was the character of this plea before the Common Law Procedure Amendment Act (Ireland) 1853, and such its character has continued to be since that Act; and I never could understand why, in respect to a plea so fair and just in its essence, the law has always been so much twisted and distorted to procure its technical defeat. However, the Common Law Procedure Amendment Act (Ireland) 1853, following out the pre-existing practice, by its 75th section provided for the payment of money into Court, in either of two cases. The plaintiff, it enacts, "may pay into Court a sum of money by way of compensation or amends, or in discharge of the plaintiff's demand, or upon any defence of tender." But the two things are perfectly distinct. When he pays money into Court, in satisfaction of the plaintiff's demand, the defendant admits not only a right of action in the plaintiff, but a right on the part of the plaintiff to institute and prosecute that action up to that time; and that he is obliged to put in a plea of payment into Court, which he pleads in bar to the further maintenance of the action. The same section also enables the defendant to pay money into Court upon every defence of tender; and, by the 76th section, "the plaintiff, in any case in which money has been lodged in Court, whether in discharge of the plaintiff's demand, or on a defence of tender," is equally entitled, as of course, to draw the money out of Court at any time before judgment has been given against him. Upon a plea of payment, the plaintiff may take out the money in full satisfaction of his demand, in which case he is entitled to all the costs incurred up to that time; or he may take it out, without accepting it in full satisfaction, and go on with the action—the question for the jury then being, whether that sum was sufficient to satisfy the plaintiff's demand in full? "In case money be lodged in Court upon a plea of tender, and the plaintiff shall be willing to accept the same in full satisfaction of the demand with respect to which the tender has been pleaded," the 49th General Order then provides that "the defendant shall be entitled

H. T. 1862.

Queen's Bench

O'RORKE

v.

M'DONNELL.

H. T. 1862.  
*Queen's Bench*  
 O'BORKE  
 v.  
 M'DONNELL.

to his costs of suit, so far as relates to such demand." If the plaintiff then acquiesces in the plea of tender, he may take the money out of Court. But if he controverts the fact of the tender, he may still take the money out of Court, and also take issue on the fact of the tender, that is to say, upon the allegation that the defendant tendered the money. Or, if the plaintiff seeks to confess and avoid the tender, he may, admitting that the sum which is alleged to have been tendered was in fact tendered, by several modes avoid that defence. The plaintiff may reply that, previous to the actual tender, he made a demand, and that the defendant refused to pay him. Because it seems to be an established principle that, if a plaintiff, who has a just claim, makes a demand for payment, with which the defendant refuses to comply, the defendant cannot afterwards avail himself of a plea of tender. Again, the plaintiff may reply a demand and refusal subsequent to the tender; and, there is yet another mode still of avoiding a plea of tender, namely, the mode prescribed by the case of *Dixon v. Clarke* (a). But, in fact, the replication in that case was but an adoption of a form to be found among the old precedents of replications given in *3 Chitty on Pleading*. In *Dixon v. Clarke*, the defendant, as to £5, parcel of the demand, put in a plea of tender, the replication to which was that, "Until and at the commencement of the action, a larger sum than £5, to wit, £13. 15s., part of the money in the declaration mentioned and demanded, was due from the defendants to the plaintiff, as one entire sum, and on one entire contract and liability, and inclusive of, and not separate or divisible from, the said sum of £5; and the same being a contract and liability by which the defendants were liable to pay to him the whole of the said larger sum in one entire sum, on request; and, further, that after the said larger sum became due as aforesaid, and at the making of the tender aforesaid, and before the commencement of this suit, and while the whole of said larger sum was so due, as last aforesaid, and while the same remained wholly unpaid and unsatisfied, to wit, &c., the plaintiff requested of the defendants the said larger sum, of which the £5 in the plea mentioned was then such indivisible parcel, as aforesaid; yet," &c. To that replication to the plea of tender a demurrer was taken; and the question was, whether, upon that allegation that the larger sum of £13. 15s. was due, as one entire sum, and on one entire contract and liability, the plaintiff was entitled to give his request and the defendants' refusal to pay the whole sum, as a good answer to the plea of tender of part of the debt? The argument proceeded;

(a) 5 C. B. 365.

and the judgment of the Court was, consistently with earlier authorities and established precedents, that it was a good answer to the plea of tender, which the plaintiff had thereby avoided. In truth, the decision in *Dixon v. Clarke*, though apparently in conflict with, yet in substance followed, the case of *Hesketh v. Fawcett* (a), in which case a replication similar in form was held defective. That replication, however, though it had averred that the larger sum in the declaration mentioned was part of the same cause of action as the money tendered, yet had omitted to aver that it was due *as part of one entire sum and on one entire contract and liability*. It simply averred that the larger sum was part of the same cause of action. The plaintiff was allowed liberty to amend his defence, if he thought fit; but judgment was given against him on the demurrer, upon the ground that the averment "that the larger sum was part of the same cause of action" was not equivalent to the allegation that it was due as one entire sum and on one entire contract and liability; and the distinction was said to be very obvious, because several sums may constitute but one cause of action. I have called attention to these cases, and to the nature of a plea of tender, with a view to the better understanding of the record in the present case; and now refer again to the pleadings. The sum tendered (£45) was only a portion of the sum which admittedly was due; for it is observable that the defendant accompanied the plea of tender of that sum with a plea of a set-off of a further sum of £10. That plea of tender the plaintiff met, not by negating the fact of tender—not by confessing and avoiding the tender—not by a traverse of the tender, or by a replication of a prior or subsequent demand, and refusal of payment, or that the sum tendered was only a portion of a larger sum due as one entire sum upon one entire contract, but by a course of proceeding which is simply a confession of the tender, and equivalent to the entering of a *nolle prosequi* upon that plea; for she took the money lodged out of Court, and offered no issue on the plea of tender; but took two issues—one upon the plea of set-off, and the other upon that plea which I have shown to be equivalent to the old plea of *nil debet*. Therefore, the fact of the tender of a sum of £45 was not in controversy in the action. The plaintiff's right to that sum never was contested. It had been offered to her before action brought. It was brought into Court under such defence as entitled her to get it out of Court, even if she had been nonsuited; and she was further entitled to avoid the actual tender by demanding the whole sum after the tender, if she had thought fit so to do. However, the plaintiff did none of these things, but adopted the course which I have

H. T. 1862.  
*Queen's Bench*  
 O'BORKE  
 v.  
 M'DONNELL.

(a) 11 Mec. & W. 356.



H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

pointed out; and, even if there was no authority on the subject, and I was obliged to determine this case upon the cause of action stated upon the pleadings, upon the judgment entered on the *postea*, upon the course pursued, upon reason and principle, and upon the words of the Common Law Procedure Act (Ireland) 1856, s. 97, my determination would be, that the plaintiff had *recovered* no greater sum than the £8, which was the only thing in controversy in the action, and not the £45. If the defence of tender, before action brought, had been pleaded to the whole of the plaintiff's demand—if, in place of a defence of tender of £45, it had been a defence of tender of £53, before action brought, and the action had gone down to trial upon that state of the pleadings, and the issue had been found for the defendant, that the tender was sufficient, what would then have been the plaintiff's course? Why, although the defendant would, in that case, have pleaded what was not indeed a bar to the action, but a defence to the entire cause of action, upon which a verdict in her favor entitled her to judgment, and to all costs, yet the plaintiff, nevertheless, would have got the whole sum which had been brought into Court.

There are, however, decisions of great weight on both sides of the question, which are entitled to the most careful consideration, before judgment can be given on this question. The case to which the plaintiff's Counsel principally directed our attention, and on which he strongly relied, was *Crosse v. Seaman* (a), which will be found reported more at large, 2 *Lowndes, Max. & Pol. Pr. Cas.*, p. 273. It was an action of debt, brought to recover £26. 1s. 5d.. The defendant pleaded, except as to £7. 15s. 0d., never indebted; secondly, except as to £7. 15s. 0d., payment; and thirdly, as to £7. 15s. 0d., tender and payment into Court. The plaintiff joined issue on the first plea, traversed the second, and, admitting the tender, entered a *nolle prosequi* as to the £7. 15s. 0d. The action was one of contract; and the plaintiff had a verdict for £18. 6s. 5d. If he was entitled to add to that sum the sum tendered, he had *recovered* in the action a sum of £26. Counsel then moved for a rule to enter a suggestion upon the roll, to deprive the plaintiff of costs, under the 10 & 11 *Vic. (Loc. & Per.)*, c. 71, s. 113, commonly called the "London Small Debts Act." In the course of the argument, the true point was suggested by the Court. Cresswell, J., said:—"The plaintiff was entitled, at the time when he brought the action, to £26. For that sum he could not have sued in the local Court. The action was, therefore, well brought in this Court." Again, the same learned Judge interrupted

(a) 10 C. B. 884.

Counsel, and asked, "How does this case differ from the case of *H. T. 1862.*  
 "a set-off? A defendant is not bound to plead a set-off; and the *Queen's Bench*  
 "plaintiff cannot tell whether he will do so or not: so here, how *O'BORKE*  
 "could the plaintiff tell that you intended to plead a tender?" Also, *v.*  
*Jervis, C. J.*, said, in his judgment—"The plaintiff was entitled to *M'DONNELL.*  
 "upwards of £20; and he could not have recovered his debt in the  
 "local Court." Now, when I heard that case cited, I thought that  
 it had proceeded upon the second branch of the statute, namely, that  
 the plaintiff had *recovered more than* £20. It did not, however,  
 proceed upon that ground, but upon this, that, at the time of  
 action brought, the plaintiff's demand amounted to more than £20;  
 and that, from the amount of the demand, he could not, at that time,  
 have instituted an action in the local Court, under the London  
 Small Debts Act, which could only have operation in cases in  
 which the demand was for a sum less than £20. I am thus  
 particular in calling attention to the case of *Crosse v. Seaman*,  
 because, whether correctly decided or not, it is a simple decision  
 that, at the time of instituting the action, the plaintiff had a demand  
 for more than £20, and, therefore, could not have sued in the  
 Inferior Court. But the inapplicability of that case to the one  
 now before us will be better shown by the case of *Woodhams*  
*v. Newman (a)*, in which the question arose under the same Act;  
 and, the defendant having pleaded a set-off, which reduced the  
 plaintiff's demand below £20, it was held that the plaintiff was  
 nevertheless entitled to full costs, because, at the time of action  
 brought, his demand was for a sum greater than £20; so that  
 he could not have maintained his demand in the local Court;  
 and the circumstance that his demand was cut down below £20,  
 by a plea of set-off, would not enable him to sue in the local  
 Court, and that, therefore, he was entitled to full costs. It is  
 not for me to say whether each of those cases was well decided  
 in the particular instance. Their bearing on the present case is  
 simply that, in *Crosse v. Seaman*, the Court of Common Pleas  
 in England held that a sum tendered before action brought was,  
 nevertheless, a portion of the plaintiff's original demand, disen-  
 titling him to sue in the Court below. As to *Woodhams v.*  
*Newman*, I only say that it is no authority on the present question:  
 because there is no doubt that, under the Common Law Proce-  
 dure Act, if a plaintiff's demand is reduced by a set-off under  
 £20, he is thereby disentitled to costs. *Crosse v. Seaman* was  
 relied upon as overruling *Dixon v. Walker*. The plaintiff's Coun-  
 sel, passing from *Crosse v. Seaman*, principally relied on (as

(a) 7 C. B. 654.

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

being a case directly in point) *Cooch v. Maltby* (a), which was a decision of Wightman, J., sitting alone. That action was brought to recover a sum over £20, namely, £31. 5s. 8d.; and the defendant pleaded, except as to £23. 5s. 8d., never indebted, and a set-off; and, as to the sum of £23. 5s. 8d., a tender. To the plea of tender, a replication, by way of traverse, was filed. The case was referred to arbitration; and the arbitrator found the issue for the defendant, that he had tendered a sufficient sum. Upon the other issues the arbitrator found for the plaintiff, £3. 1s. 3d., on the first issue; so that, if the sum tendered was to be considered as *recovered* in the action, the plaintiff had *recovered* £26 altogether. The arbitrator, holding that he had authority under the order of reference so to do, certified that the cause was a proper one to be tried before a Judge of one of the Superior Courts; and the Master thereupon taxed the costs on the higher scale. But, whatever effect the certificate may have had, Wightman, J., in giving judgment, did not take it into account; and the case was decided as if the certificate had not been given. The case came before Wightman, J., upon a motion to show cause against a rule *nisi* to review the Master's taxation. The question arose upon the directions given to the Taxing-officers in one of the General Orders, whereby it was provided that, "In all actions of contract, other than, &c., where the sum recovered, or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed £20 (without costs)," the plaintiff should recover costs only on the lower scale, unless the Judge certified that it was a proper case to be tried in one of the Superior Courts. I have adverted to the words of that General Order, because they are similar in effect to the words of the Common Law Procedure Amendment Act (Ireland) 1856, s. 97; so that the case of *Cooch v. Maltby* is a direct authority in favor of the present plaintiff. Wightman, J., after hearing the argument, and adverting to the case of *Dixon v. Walker*, which he admitted to be an authority directly against his opinion, went on to state:—"But it appears to me that there is a ground which does not seem to have been adverted to in the cases cited—certainly not in *Dixon v. Walker*, which seems to me to be decisive of the question—and that is, the nature of a plea of tender. Now, a plea of tender is not in bar of the action. The language of a plea of tender is—'that the plaintiff ought not to have the action to recover more than' the sum tendered. The plaintiff is entitled to have, at all events, that

(a) 23 Law Jour., N. S., Q. B., 305.

"amount. There is a case which has not been adverted to—*Giles v. Hartis* (a), which seems precisely in point. There it is said—  
 "Though a tender is made, and the plaintiff refuses the money, yet  
 "the tender cannot be pleaded in bar of the action; neither in debt  
 "nor assumpsit, but in bar of the damages only; for the debtor  
 "shall, nevertheless, pay his debt." Therefore, Wightman, J.,  
 after citing that case, proceeds to say—"It seems to me that the  
 "plaintiff recovers in the action not only the sum beyond the  
 "amount tendered, but that amount also. I give no opinion  
 "respecting the effect of a plea of set-off; and I treat this case  
 "as if there had been no certificate of the arbitrator with respect  
 "to the costs." That judgment is quite in point, and is based upon  
 the nature of the plea of tender—that it is not pleaded in bar to the  
 action. The plea of tender is only a defence against the recovery of  
 a further sum of money. But the learned Judge seems to me to  
 have lost sight of the principle that the plea of tender, though tech-  
 nically it is not a bar to the action, is a defence to the action; and  
 that the defendant, when he succeeds upon that plea, succeeds  
 entirely, and get his costs. Again, we have the case of *Hughes*  
*v. Guinness* (b), which was strongly relied on for the plaintiff.  
 It was a decision of the Court of Common Pleas in this country.  
 The action was brought upon a special contract. The defendant  
 simply lodged £6 in Court, but not upon a plea of tender. At  
 the trial the plaintiff got a verdict. Therefore, he could not have  
 accepted the sum lodged in full satisfaction of his demand, but  
 must have gone on to trial upon the issue whether £6 was  
 sufficient to satisfy his demand; and, if not, what sum beyond  
 that lodged would be sufficient for that purpose? The verdict  
 was given for £16—that is to say, that the plaintiff was entitled  
 to recover in the action £16 and £6. The report then states  
 the decision of the Taxing-master, who allowed the plaintiff full  
 costs on the issues found for him; and the argument then pro-  
 ceeds upon the Common Law Procedure Act (Ireland) 1853, s. 243,  
 which gave only half costs where the plaintiff in such an action  
 recovered less than £20. A number of cases were cited; and,  
 in the course of the discussion, it appeared that "the officer of  
 "the Court here mentioned that the £6 lodged in Court not  
 "having been drawn out by the plaintiff, judgment had been  
 "marked for £22." The Court thereupon "directed the officer  
 "that, for the future, judgment in such cases should be marked  
 "only for the sum found by the jury over and above the amount  
 "lodged in Court, whether drawn out or not." Monahan, C. J.,

H. T. 1862.  
*Queen's Bench*  
 O'ROFFE  
 v.  
 M'DONNELL.

(a) 1 Lord Ray. 254.

(b) 4 Ir. Com. Law Rep. 314.

H. T. 1862.

Queen's Bench

O'BORKE

v.

M'DONNELL.

delivered the judgment of the Court; and, after stating the terms of the motion, and the facts of the case, proceeded thus:—"Now, the question is, has the plaintiff, according to the true construction of the section, recovered less than £20? It has been argued that, whatever the facts may be which prevent a plaintiff from getting judgment for more than £20, if, in point of fact, he has obtained a judgment for a sum less than £20, he is only entitled, under the 243rd section of the Common Law Procedure Act 1853, to half his ordinary costs. That astute argument goes this length, that, although the plaintiff should get everything which he seeks by his summons and plaint, being an amount over £20, still he ought not to get his full costs, because part of the sum recovered was money lodged in Court, and part was recovered by the verdict of a jury. We are of opinion that such a view is not in accordance with the true construction of the Act. We think that the meaning of the 243rd section is, that if the plaintiff, in an action on a contract, recover *by force of his action*, whether by the verdict of a jury or not, a sum not less than £20, he is entitled to his full costs of suit; and, accordingly, in the present case, the plaintiff is so entitled." The very statement of that case shows that, however general the language of the Court may have been, and however proper it is to be considered as affording an argument for the plaintiff here, yet that that case is no authority whatever as a decision upon the question which we have to determine; because the plaintiff here had, at the time of action brought, not only a demand for over £20, but also a demand for which he had a right to institute an action; and the defendant, confessing that the plaintiff had a right to institute that action, brings into Court a sum of money upon a defence of tender. From the time of making the tender, the defendant confesses that the plaintiff had a right to the amount tendered. But that tender, if found for the defendant, amounts so far to a defence to the action, and disentitles the plaintiff to his costs. Besides, here, where the plaintiff proceeds after a defence of tender, it is manifest that he does not recover the money lodged *by force of the action*, because it never has been in dispute; and what is recovered is only the sum obtained beyond that tendered. Such were the authorities relied on for the plaintiff.

On the other hand, the defendant relied on two authorities—*Dixon v. Walker* (a), which unquestionably is directly in point. It was decided, in the year 1840, by Alderson, B., sitting alone; and it is supposed to have been overruled by *Crosse v. Seaman* and *Cooch v. Maltby*. It was an action of debt for more than £20.

(a) 7 M. &amp; W. 214.

As to part of the demand, the defendant pleaded a tender before action brought; and, as to the residue of the demand, *nunquam indebitatus*. The plaintiff took the sum lodged out of Court, and entered a *nolle prosequi* as to that amount. At the trial, the plaintiff got a verdict for the balance of his demand, £13. The Master allowed the plaintiff his costs, according to the ordinary scale; and, upon motion by the plaintiff, showing cause against a rule *nisi* to review the decision of the Master, the question was, whether the plaintiff had recovered, as well the sum tendered as the sum for which he had got a verdict? Alderson, B., said:—"I think the rule must be absolute for reviewing the taxation. The cases of set-off which have been cited govern the present—indeed they are stronger; because there it is in the option of the defendant to set off his counter-claim or not. Therefore, the plaintiff must bring his action for the whole of his demand; yet, in the two cases cited, it was taken for granted that the plaintiff's right of action is defeated to the extent of the set-off, and that the 'sum recovered' in the action is only the balance. *A multo fortiori*, the plaintiff here is defeated to the extent of the money tendered; and the sum recovered is only the surplus. Those cases, therefore, must govern the present. I am not, however, to be considered as deciding that money paid into Court after action brought is not part of the sum recovered; but only that, where the payment or tender amounts to matter of defence *pro tanto*, the sum recovered is only the difference." The very statement of that case shows that, whatever its value may be as an authority, it is precisely in point. If, therefore, the case rested there, we should have to determine between the decisions of Alderson, B., and Wightman, J. There is, however, another authority of still greater weight, which was mentioned during the argument—I allude to the case of *James v. Vune* (a), which was decided so recently as the year 1860, and seems to be the latest case upon this subject. The declaration, in that case, contained counts for goods sold and delivered, work and service done, and materials provided, use and occupation, and upon accounts stated. Plea, except as to £26. 10s. 6d., parcel, &c., never indebted; secondly—as to the said sum of £26. 10s. 6d., a tender before action. At the trial, it appeared that the action was brought to recover two sums of £24. 8s. 10d. and £4. 10s. 6d.; and the jury found, as to £26 10s. 6d., that the defendant did tender that sum, and the plaintiff refused to accept it, and that it was not enough, by £2. 8s. 10d., to satisfy the claim of the plaintiff. The Judge refused to certify that the cause was a proper one to be tried before him; and,

H. T. 1862.  
*Queen's Bench*  
 O'BORKE  
 v.  
 M'DONNELL.

(a) 29 Law Jour., N. S., Q. B., 169.

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

upon taxation, the Master decided that the plaintiff was entitled to costs upon the higher scale, and taxed them accordingly. The defendant's Counsel obtained a rule *nisi* to review the Master's taxation; and, upon showing cause against that rule, the question depended upon this, whether the plaintiff had *recovered* the sum tendered, as well as the sum obtained by the verdict? No case was made that the sum tendered was portion only of a larger sum; but the case was a simple denial of the tender.

In the course of the argument, Hill, J., stopped Counsel, and put this case:—"Suppose an action was brought for £50, and the defendant pleaded simply a plea of tender, and that he brought the money into Court. Suppose also that the jury found their verdict upon the plea for the defendant. The judgment must be for the defendant, with costs; the plaintiff could not have judgment." And Cockburn, C. J., added:—"If the tender covers the whole amount sued for, the plaintiff gets no judgment at all." Hill, J., put that case, to test whether it could be truly said that the sum which was the subject of the plea of tender could be truly said to be *recovered* in the action? Then Crompton, J., said:—"In the old times of pleading *ore tenus*, the defendant would bring the money in a bag into Court, and would say, 'Here it is. I have always been ready and willing, and have offered to pay it.' So now he delivers it to the officer of the Court, and you cannot get judgment for it." Crompton, J., after a little time, again intervened in another part of the argument, and asked—"If he takes the money, what can he have judgment for? *Quoad* so much, he cannot have judgment." Hill, J., added—"If the money was tendered to you, the action could not be necessary to enable you to get it. The action must be treated as being brought for the excess above the sum tendered." Now after these observations of the Court, I think it is obvious that the *very* point for their decision was, whether the Court could treat the sum of £26. 10s. 6d., which was the subject of the plea of tender, which was found for the defendant, as *recovered* by the plaintiff in the action? Cockburn, C. J., delivered the judgment of the Court. But, before I read his judgment, I should observe that, during the argument of the present case, an effort was made to distinguish it from *James v. Vane*, and to show that the latter case was no authority for the present defendant.—[The learned Judge then read the judgment of Cockburn, C. J., and resumed.]—Now the Lord Chief Justice there pointed out the true distinction between the two classes of cases. But it is not to be forgotten that the plaintiff, if he relies upon the fact that the tender was vitiated because the sum tendered was only a portion of a larger sum due upon one entire contract, indivisible and payable in one

entire sum, must reply that specially, so as to avoid the plea of tender.—[The learned Judge then read the remainder of the judgment in *James v. Vane*, and proceeded.]—Arguments were raised at the Bar here to distinguish that case from the present, and so to detract from its authority. With some Members of the Bench those arguments had great weight. But, in my humble judgment, that case is so precisely in point, that it is idle to attempt to distinguish it from the present. It may have been erroneously decided; but to distinguish it from the present case, upon any substantial ground, I hold to be impossible.

H. T. 1862.  
Queen's Bench  
O'BORKE  
v.  
M'DONNELL.

I have said that, if the present case stood denuded of all authority, still, upon principle, my judgment would be in favor of the defendant, upon the construction of the word "recover" in the Common Law Procedure Act (Ireland) 1856, s. 97; and I am now to say whether my judgment is shaken by the authorities adverse to that view. No doubt, those authorities are entitled to great respect. But they are encountered by two express decisions—one of Alderson B., in *Dixon v. Walker*, while the judgment of Wightman, J., in *Cooch v. Malby*, has been expressly overruled by the later decision of the Court of Queen's Bench in England, in the case of *James v. Vane*. That case was decided soundly upon the construction of similar words occurring, though not in a statute, yet in a General Rule of the Courts, and decided moreover consistently with the common sense view that the subject-matter in controversy is not the sum tendered. I am supported in this view by the form of the judgment recovered in this action, and which the plaintiff has entered up. This is not a question of what occurred at the trial, nor are we entitled to take into consideration anything that occurred there, for no motion to enter a suggestion on the roll is necessary in this country. It appears, by the judgment in this case, that the plaintiff has *recovered* less than £20; and this view is strengthened by the fact that the plaintiff took the money out of Court, and, by passing by the plea of tender, without joining issue thereon, confessed, or at least admitted, the sufficiency of the tender, and then entered up judgment for a sum of £8 only.

As to the case of *Crosse v. Seaman*, it is observable that no question arises here (as distinguishing that case from the present), whether the action might originally have been brought in the Civil-bill Court. The question here is, not whether the case is within the jurisdiction of the Civil-bill Court; for there are cases in which the plaintiff could not sue in the Civil-bill Court, and plaintiff, if he recovered less than £20, would lose his costs; as, for instance, if his debt was £50, but reduced by a defence of set-off

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H. T. 1862. below £20; and, again, there are many cases in which the plaintiff  
*Queen's Bench* is entitled to full costs, even though the sum of £20 be not *recovered*  
 O'ROBKE by him, and both parties resided within the jurisdiction of the Civil-  
 v. bill Court. But the question here is, did the plaintiff *recover* less  
 M'DONNELL. than £20?

It was said, during the argument, that a decision in defendant's favor would be full of hardship. But, in truth, these cases of hardship are beside the question as to the construction of the statute, if the statute is clear and free from doubt. They may indeed test the arguments, but, beyond that, are fraught with danger, and calculated to mislead. I may say too that, in the great number of cases, all hardship is provided against in this way—the Common Law Procedure Amendment Act (Ireland) 1856, s. 97, under which the question in the present case arises, provides against the hardship, and puts these imaginary hardships out of the case. That section provides that a plaintiff shall get full costs if the Judge who presides certifies that the case was a proper one to be tried in one of the Superior Courts; or, in case the action does not go down to trial, if the Court or a Judge, upon motion, shall make an order to the like effect. No doubt, that is not a complete answer to the argument from inconvenience and hardship, because giving or withholding the certificate is left a matter of judicial discretion. I must say that if, in the present case, an application had been made to me at the trial, I would most unhesitatingly have refused to certify that the case was a proper one to be tried in a Superior Court. The plaintiff was a poor woman, struggling to maintain herself by making dresses. The defendant was engaged in a similar occupation, and the witnesses were numerous, and brought from a considerable distance. It was an abuse to bring the case into a Superior Court at all, when a sum of £8 only was in controversy between the parties. The sum of £45 had been tendered unconditionally; and, in place of suing in the Civil-bill Court for the balance, the whole of these poor women were dragged, either as parties or witnesses, a long distance to Nenagh. Upon these grounds, I would have refused the certificate at the trial; and, upon the whole case, I am of opinion that the plaintiff *recovered* a sum less than £20, and that the defendant is, therefore, entitled to our judgment.

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NOTE.—*Beard v. Perry* (31 Law Jour., N. S., Q. B. 180; S. C., 8 Jur., N. S., 914).—Since this case was decided, the Court of Queen's Bench in England has held, in a unanimous judgment, that, "Where a plaintiff in an action in a Superior Court proves a debt for a sum exceeding £20, and the defendant proves a set-off for a less amount, leaving a balance not exceeding £20, the plaintiff *recovers the balance only*, within the meaning of the 13 & 14 Vic., c. 62, s. 11; and he is, therefore, deprived of all costs by that section."

HAYES, J.

The question here, which arises upon the 97th section of the Common Law Procedure Act 1856, is shortly this—whether the plaintiff has recovered in this action of contract a sum less than £20? That is a simple question of dry law, with which matters of feeling have nothing to do. Upon the authority of decided cases—*Cooch v. Maltby* (a) and *Crosse v. Seaman* (b)—I am of opinion that the plaintiff has recovered in the action £20 and upwards. Other cases have been cited, which were not cases of tender, but of ordinary payment of money into Court. Probably, there may be very close analogies between them; but I pass them by, as those I have cited seem to me to be more in point. There is another authority (already adverted to by my Brother FITZGERALD), which bears very strongly upon the subject, and which has in its favor not only the weight of the eminent Judges who decided it, but also the weight of good common sense—I mean *Dixon v. Clarke* (c). That was an action for £26, for use and occupation. The pleas were, as to £5, parcel of the sum claimed, a tender and payment into Court; and, as to the remainder of the demand, *nil debet*. To the plea of tender, there was a replication, which substantially admitted the tender of £5, but insisted on its total insufficiency as a bar to the action, or any part of it, inasmuch as there was then due to the plaintiff an indivisible sum of £25, flowing out of a single contract. That replication was held to be a good answer to the plea. I refer particularly to the exposition given by Chief Justice Wilde, in his judgment, of the principles on which the plea of tender rests. That case decides, I think, that, in the case of an action for what we may call an indivisible sum, by which I understand a demand arising out of one contract, and which, when the whole sum has once accrued due, will not bear to be split, so as to form two or more separate causes of action, a tender ought to be of the whole money due; and, if not so, the party is entitled to refuse it, without prejudice to his action. *Dixon v. Clarke* has been confirmed by the Court of Queen's Bench in England, in *Searles v. Sadgrave* (d).

Now, what is the case before us? Reading the matter by the light of the trial, we find that the plaintiff was entitled to recover a sum of £63, upon an entire contract for wages or salary, which had been earned during five and one-half years. That whole money being due, she could not bring an action, first for one year's salary,

H. T. 1862.

Queen's Bench

O'BORKE

v.

M'DONNELL.

(a) 23 Law Jour., N. S., Q. B., 305.

(b) 10 C. B. 884; S. C., 11 C. B. 524.

(c) 5 C. B. 365.

(d) 5 ELL. & BL. 639.

H. T. 1862.  
*Queen's Bench*  
 O'BORKE  
 v.  
 M'DONNELL.

and then for another, and so on; she must sue for all together. That being the state of things, the defendant offered her £45. She refused it, and brought her action, as she was bound to do, in one of the Superior Courts. The defendant pleaded thus:—"I only owed "you £55, for £10 of which I have a set-off; and, as to the other "£45, I tendered that sum to you before action brought." Upon that state of the pleadings, the case went to trial. The plaintiff admitted the fact that the sum of £45 had been tendered, and that the set-off was a good set-off; so that the only question to be tried was, whether anything further was due to the plaintiff? The jury found that the defendant owed to the plaintiff an additional sum of £8. Now, upon the authority of *Dixon v. Clarke*, and *Searles v. Sadgrave*, the tender was wholly insufficient, and was worth nothing. That is common sense. The opposite doctrine would lead to absurd consequences, in illustration of which I took occasion, during the argument, to put to Mr. *Ferguson* the case of a person having a demand of £20 against another, on foot, say, of a bill of exchange, or use and occupation, for which he might well sue in the Superior Courts; and I asked Mr. *Ferguson* was such a person to be driven, under terror of losing his costs, to sue in an Inferior Court, by his adversary's tendering him the sum of sixpence on foot of his demand? Mr. *Ferguson* was put to argue that it was the plaintiff's duty to take any sum which the defendant offered. Now, I do not think that a creditor is bound to take payment of his single demand in dribblets; and, therefore it is that, I think, common sense goes with the decision in *Dixon v. Clarke*.

Of the cases which were cited for the defendant, I think *Dixon v. Walker* (a) is quite in point; but, opposed as it is to the later cases I have referred to, I do not concur in the decision of Baron Alderson; and perhaps that very learned Judge would himself have come to a different conclusion, if he had decided it in the year 1860, instead of 1840. It was an action, say, for £20, brought after a tender and refusal of £13. The defendant pleaded the tender; and the plaintiff, after taking the money out of Court, proceeded with the action, and recovered a verdict for the balance, say £7. By analogy to the decision in a case of set-off, that had been cited before him, Baron Alderson held that the plaintiff's cause of action was defeated *pro tanto* by the defendant's tender, insufficient as it was; whereas, in the case of *Dixon v. Clarke*, which was decided after a careful consideration of the authorities, from the *Year-Books* downwards, it was held that the tender of an insufficient sum does

(a) 7 M. & W. 214; S. C., 4 Jur. 1188.

not avail to defeat the action *pro tanto*, but is to be put out of the case altogether, as of no value.

Another case very strongly relied on for the defendant was *Evans v. The Great Southern and Western Railway Company* (a). There, a person met with an accident while travelling on the railway of the defendants. They employed a surgeon to attend him. The surgeon, not being paid his fees, brought his action for a sum of £22. The defendants lodged in Court a sum of £11. 11s. 0d.; and, at the trial, the plaintiff recovered a verdict for £16. 10s. 0d.; that is to say, for the £11. 11s. 0d. which had been lodged, and for £4. 19s. 0d. additional. Then arose the question, to what costs was the plaintiff entitled? It was decided, under the 14 & 15 Vic., c. 57, s. 40, that he was not entitled to any costs at all, because he had not obtained the requisite certificate from the learned Judge who tried the case, and the entire amount recovered was less than £20. One is at a loss really to know how any other decision could have been come to under the circumstances. In no way had the plaintiff recovered more than £16. 10s., by force of the action. A point was made there as to the admission of jurisdiction by lodgment of money in Court. Suffice it to say, that no such point has been made here; and I dismiss the case, as having, in truth, no profitable bearing on the question now in controversy before us.

H. T. 1862.  
Queen's Bench  
O'RORKE  
v.  
M'DONNELL.

The only other case to which I shall now refer is *James v. Vane* (b). I think it plainly distinguishable from this case, and on the grounds suggested by the LORD CHIEF JUSTICE in his judgment. It was an action to recover the sum of £28. 19s. 4d., the amount of two distinct demands, as flowing from two distinct contracts, viz., for goods sold and delivered, and for use and occupation. These claims being perfectly distinct, the defendant, before action brought, tendered £26. 10s. 6d., a sum which, though not sufficient to liquidate both demands, was quite sufficient to discharge one of them. The plaintiff refused to accept that sum, and brought his action for the whole amount claimed. The defendant relied on his tender; and, at the trial, the jury found that that sum had been tendered, but awarded the plaintiff an additional sum of £2. 8s. 10d., being the balance of his claim. Cockburn. C. J., in giving judgment, held that the course taken by the plaintiff was unjustifiable; but took a marked distinction between the case of a person who had two distinct demands, and of one who had a single demand arising out of one entire contract. He says:—"Where the amount which the plaintiff claims is the result of one demand, which cannot be

(a) 5 Ir. Jur. 329.

(b) 29 Law Jour., N. S., Q. B. 169; S. C., 6 Jur., N. S., 731.

H. T. 1862. "separated, he is entitled to say, 'I will not take less than the entire  
*Queen's Bench* "sum.' But when the claim is an aggregate of several distinct  
 O'BORKE "items, and the defendant says, 'I acknowledge that I owe you in  
 v. "respect of so much,' which he tenders, the plaintiff is in the wrong  
 M'DONNELL. "if he refuses to accept it, and *quoad* that amount he ought not to  
 "be allowed to keep alive his claim in its entirety, so as to enable  
 "him to bring his action against the defendant in the Superior  
 "Court, and subject the defendant to costs on the higher scale."  
 Keeping this distinction in view, and having regard to the facts  
 of that case, I think that *James v. Vane* was rightly decided; but,  
 as it appears to me, is quite distinct from the case now before the  
 Court. Therefore, I have come to the conclusion that, upon the  
 authority of the cases cited, and of sound reason and common sense,  
 the Taxing-officer has come to a wrong decision, and that he ought  
 to be directed to tax the plaintiff her costs on the higher scale.

O'BRIEN, J., concurred in the opinion that the plaintiff is entitled to full costs of the action, and that her present application should accordingly be granted.

LEFROY, C. J.

In this case it would appear to be a matter of very great difficulty to find some one point upon which there is an entire concurrence of opinion among the Members of the Bench. It is, however, as has been already observed, a case of great importance, not only to the parties immediately concerned, but also as a precedent which may affect many other cases, and, therefore, deserves the fullest consideration. It is one of a class of cases upon which, not only the most eminent Judges, but also the Courts themselves in England have been divided in opinion; and on which the Court, now about to give judgment, is also divided in opinion.

After the review of the authorities so fully and accurately given by my Brothers, and especially by my Brother FITZGERALD, I cannot add to the cases, and very little to the observations that have been made on either side. This, however, I am prepared to say: it appears to me that the weight and authority of the cases in support of the plaintiff's motion, very much preponderate over the cases cited on the other side. That observation I make, not merely in reference to their accordance with the spirit and intention, as well as the language of the Act, to the construction of which they were applied, but also in reference to the great maxim of the the Common Law, *lex plus laudatur quando ratione probatur*,

and I may say—(with the sanction of the observation of Maule, J., who said, in the case of *Crosse v. Seaman* (a), “He was glad to find that common sense still lingered in Westminster Hall”).—It appears to me, as I have observed, that adverting to the object and intention of the Legislature in the clause in question (section 97), and to the language in which they have expressed themselves, the construction put upon it in favor of the plaintiff is much more consonant with the spirit and intention, as well as the language of the Act, than the contrary interpretation. What was the plain, obvious intention of the Legislature in enacting this section? It was simply to prevent parties, whose demand did not amount to something substantial (which they fixed at not less than £20), harassing their adversaries by suing them in the Superior Courts, whilst they had an opportunity of having the question between them decided in the inferior jurisdiction. But what did the Legislature mean when they used the terms “that a party, who has recovered “in the action on foot of his demand a sum less than £20, shall “not get full costs”? What is meant by “demand,” and what by “recovering in the action”? Upon any rational interpretation of the word “demand,” the Legislature must have meant, not what the plaintiff should claim by his plaint, not the sum to which he might *fancy* himself entitled, but the sum which was actually due to him at the time of bringing his action. Taking the language of the section in its strictest sense against the plaintiff, can we suppose that the Legislature meant anything else than this, that the party who should appear to have had, really and truly, *at the time when he brought his action*, a demand at least amounting to £20, should not be precluded from the benefit of trying any question between him and his adversary, upon such a demand, in the Superior Courts? Is not that the time at which he may be fairly required to exercise a judgment at his peril, in what Court to institute his suit; and are we to inflict the penalty imposed by the Act, upon the general right of every man to resort to the higher tribunal, except in the particular case in which he is clearly restrained by the Act itself? That is the first question which arises upon the Act. And now let us try what was in reality the demand of the plaintiff when this action was commenced—let us try it by the test, not of what she inserted in the plaint, no nor even by the sum stated in the more particular specification by indorsement, but by the test of what she proved at the trial to have been the amount of her *bona fide* demand when the action was brought. It appears now, beyond all doubt, that her demand was at that time

H. T. 1862.  
Queen's Bench

O'BORKE  
v.

M'DONNELL.

(a) 1 Co. B. 524.

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

well-founded for no less a sum than £63; though liable no doubt to be reduced by any defence that could be produced, such as a set-off; and the next question is this—was there any ground here for saying that the plaintiff's demand, as a real existing demand, did not amount before action commenced to £63? or that, prior to the commencement of the action, the plaintiff had any ground whatever for supposing that her demand was or could be reduced to an amount less than £20? On the contrary, it must be admitted that at that time £45 at all events was due, because the defendant tendered that sum. Here then is a plaintiff who establishes at the trial that, out of a demand of £110, a sum of £63 was justly and properly due before action commenced; and of this sum of £63 the defendant admitted that, beyond all question, the sum of £45 was a just and fair demand. Well then, here are parties contesting about such sums as these; and the question arises between them, which sum is right? Was it the intention of the Legislature that the parties, in such a case, should not be entitled to have that question tried between them in the Superior Courts? It is said, however, that although the plaintiff was, as proved by the confession of her adversary, and by the evidence she gave at the trial, entitled to sue for that large sum; yet, by the plea of tender of £45 before action brought, the plaintiff's position was so changed that she was not to proceed with her action. Without going into the cases which have so conclusively settled that a tender of a less sum than that actually due upon one entire contract, is no bar or defence to the action (and that was decided so long ago as the time of Lord Raymond, in the case of *Giles v. Hartis*) (a), let us consider what was the effect of this plea of tender of £45. It was said that the money was brought into Court when the tender was pleaded. Perfectly true; but was the money brought into Court when the tender was made? What brought the money into Court? The bringing of the action. And then we are told that, although the money was then for the first time brought into Court, and might for the first time be said to be in the pocket of the plaintiff, yet that that it was not "recovered" in the action. In this case, the confusion has arisen from confounding a plea of tender, which involves in itself the necessity of bringing the money into Court, with a tender before action, which does not involve the bringing of the money into Court, or place the plaintiff in the same condition as she is in after action brought. Therefore, it is properly and justly said that the action is the means whereby the plaintiff is entitled to have the money in Court which is therefore justly and properly consi-

(a) 1 Lord Ray. 254.

dered to be *recovered in and by means* of the action; because then, for the first time, the plaintiff has been put into possession of the sum justly due. It appears to me, however, that, independently of the cases cited, in which it is said that that is the fair, settled, construction, upon payment of money into Court with costs—and, *a multo fortiori*, that construction must apply to the case where the money is not paid into Court until it comes in as accompanying a plea of tender after action brought, which is not a bar to the action, the plaintiff should not be put in a worse position, in that case, where the money is brought in without costs, than in the case of a lodgment. In the latter case, the plaintiff would have got costs; but, in the former, there is no method of proceeding to get costs. Unquestionably, this action was originally properly brought in the Superior Court; and then no mode remains of proceeding to get costs in the action, although it cannot be denied that the plaintiff had *then* a just demand, unanswered, to the extent of £45. Is she then to forego her right to costs? It was said indeed that she should have taken the sum originally tendered, and gone on for the balance in the Inferior Court. But, even if she had got her costs incurred up to that time, how would she stand in the Inferior Court, if she sued there for the balance? The money would have stood in this Court, with an allegation that it was the whole sum due to the plaintiff; and, if she had not gone on to trial, to negative that allegation, it would have remained uncontradicted on the pleadings. If, therefore, she was to take that sum out of Court *as the whole sum due*, and go to the inferior tribunal as for a residue, how would she be met? The answer would be given, “you have taken out that money as the whole sum due, and yet you come here for a demand which, by not traversing the averment in the plea of tender, you have admitted to be the whole sum due upon your demand; and, furthermore, you are coming here upon a section of one demand, contrary to the principle upon which our jurisdiction is founded, that we cannot entertain a claim for a part of a demand.” Upon every principle, the defendant’s would be a most unreasonable construction—contrary to former decisions, and to the construction put upon the effect of money paid into Court—even upon the effect of tender, that the party should be deprived of her right to full costs; and I am of opinion that it is not only in conformity with so many authorities as have been cited, but also much more consonant with the spirit, intention and object, as well as with the language, of the Act, that the plaintiff should get full costs.

H. T. 1862.  
*Queen's Bench*  
 O'RORKE  
 v.  
 M'DONNELL.

Motion granted.



M. T. 1861.  
*Queen's Bench*

Nov. 22.

RYAN v. HORGAN.\*

To a summons and plaint, containing the common *indebitatus* counts, where the bill of particulars included twenty-eight items, amounting to £400, the defendant pleaded payment into Court of £30; and as to the residue of the demand, traversed the several paragraphs of the plaint *seriatim*.

On motion, by the plaintiff, that the defendant be required to specify the items of the bill of particulars, to which his payment into Court was applicable, — *Held*, that the case was not one in which the Court would order the defendant to give the particulars required.

WATERS moved, on behalf of the plaintiff, that the defendant be ordered to give particulars as to a sum of £30 paid into Court, and to show to what items of the bill of particulars endorsed on the summons and plaint the said sum was applicable. The plaint contained only the common counts for goods sold and delivered, goods bargained and sold, work and labour, money lent, money paid, and interest; the bill of particulars contained twenty-eight items; and the sum of £400 was claimed as due by the defendant to the plaintiff, in respect of those several items. The defendant, as to £30, portion of the moneys claimed, and the causes of action relating thereto, paid the sum of £30 into Court, and pleaded that that sum was sufficient to satisfy the plaintiff's demand as to that sum; and as to the residue, traversed the several causes of action. Counsel cited *Baxendale v. The Great Western Railway Co. (a)*.

*W. O'Brien* for the defendant.

The case cited was that of a special action. This is an action on the money counts, and the Court has no jurisdiction in such a case to make the order sought. Before the Common Law Procedure Act, only two sorts of particulars could be ordered; particulars of demand or set-off, and particulars of payment. No additional jurisdiction has been given by the Common Law Procedure Act. Again, the issues have been settled in this case. Payment into Court does not admit any specific part of the plaintiff's demand: *Godfrey v. Cross (b)*; *Kingham v. Robins (c)*. There has always been a distinction taken between a special action and an action on the *indebitatus* counts: *Tattersall v. Parkinson (d)*.

*Waters* in reply.

O'BRIEN, J.

We are all of opinion that this motion should be refused. We were referred to the case of *Baxendale v. The Great Western Railway Company*, where the Court of Exchequer in England considered they had jurisdiction to make the order sought; but

(a) 6 H. & N. 95.

(b) 6 Ir. Jur., N. S., 183.

(c) 5 M. & W. 94.

(d) 16 M. & W. 752.

\* LEFROY, C. J., *absente*.

the circumstances of that case are different from those of the present. Various reasons might be suggested why in some cases it would be most inconvenient to require the defendant to give these particulars, while in others it might appear to be fair and right to do so. All we say is, that we do not consider the present case to be one in which we should make this order.

M. T. 1861.  
*Queen's Bench*

RYAN  
v.  
HORGAN.

HAYES, J.

I concur in the judgment of the Court. It would require a far stronger case than this to induce me to narrow what I consider to be the already sufficiently narrow rights of a defendant. Here, a demand of £400 is made, on foot of several items set forth in the bill of particulars, under the common counts. The defendant has a right to say to the plaintiff, "I do not owe you a farthing on foot of any of your claims; but to prevent litigation, and for peace sake, I will pay you £30; and, if you will not accept that in discharge and satisfaction of all demands, go on at your peril, and try to recover more." I do not think we are at liberty to restrict that right which the defendant undoubtedly has.

FITZGERALD, J.

This is an application to compel the defendant to furnish the plaintiff with the particular items of his demand, in respect of which a payment into Court of £30 has been made. Its object is that, out of this long detail, the defendant should specify those particular items in respect of which he has paid that sum into Court. Now, I do not wish to express any opinion as to whether the Court has or has not jurisdiction to make such an order. It is a jurisdiction which, if it exists, may be very wholesomely exercised in certain cases. I only say that, supposing the jurisdiction to exist, the plaintiff has made no case to induce us to exercise it in this particular instance. It may be very inconvenient for the defendant to be obliged to specify the very items in respect of which the payment was made. Probably he has brought that sum in as a peace-offering. He has that right given him by the 75th section of the Common Law Procedure Act of 1853, which, while it gives him that right, does not oblige him to specify the particulars to which he means to apply that payment; and the plaintiff may take that sum in satisfaction of his demand, or go on at his peril. Again, it might be very oppressive indeed to compel the defendant to specify these items. He may be unable to do so, though admitting a general demand. I have myself, when at the Bar, frequently advised a defendant to pay a sum of money into Court, as a peace-offering,

M. T. 1861.  
Queen's Bench

RYAN  
v.  
MORGAN.

and not run the risk of having a verdict against him for a small amount; and that, even in cases where the defendant declared there was no just demand whatsoever against him. Should we accede to this application, all the plaintiff would have to do, in order to obtain a verdict, would be to struggle for some small items to which the plaintiff had not applied his payment; and, if he succeeded in proving one shilling to be due upon that, he would be entitled to a verdict, although the sum paid into Court exceeded the amount which was proved to be due. That is a power which, if we possess, we should not lightly exercise; nor should we deprive the defendant of those rights which the statute has given him. We should not lose sight of this, that here is a payment into Court of £30, to meet a demand of £400; and Mr. *Waters* has not shown that it is for the ends of justice, or for the purpose of simplifying the issues, that he seeks to obtain these particulars. I cannot conclude without observing that this case shows the great inconvenience of the kind of pleading that has been adopted here, which is nothing but an abuse of common forms, and has the effect of multiplying the issues.

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MAY v. MAY.\*

Nov. 2.

The Court will not dispense with the 133rd General Order unless the non-compliance with it was caused by a "fatality."

In Vacation a conditional order was made, allowing the plaintiff to substitute service of the writ of summons and plaint, by transmitting a copy of the writ, and of the Judge's order, through the post, to the plaintiff's residence at Manchester, in England, and by effecting personal service on Mr. Ross, the plaintiff's land-agent in Ireland. The order directed that such service should be effected within one week from its date. The order was obeyed, except that service was not effected on Mr. Ross until a few days after the week had elapsed.

*Meccredy* moved the Court to make absolute the conditional order, notwithstanding the omission above stated. No cause has been shown.—[FITZGERALD, J. It was not necessary to show cause, since the plaintiff failed to comply with the order. Does your affidavit state the reason why the order was not fully complied with?—No reason is stated.—[HAYES, J. Under the 133rd General Order, the conditional order stands discharged. Did your non-compliance with the order arise from any fatality?—No fatality is stated in the affidavit.

\* Before LEFROY, C. J., and HAYES and FITZGERALD, JJ.

*Per Curiam.\**

We cannot dispense with the 133rd General Order, unless a fatality caused the failure to obey the conditional order; but we will renew the conditional order.

M. T. 1861.  
*Queen's Bench*

MAY  
v.  
MAY.

\* O'BRIEN, J., was engaged in the Commission Court.

BEAUSANG v. CONDON.\*

(*Exchequer.*)

E. T. 1862  
*Exchequer.*  
May 8.

THIS was a motion for security for costs. It appeared that notice of the present motion had been served on the 3rd of May. Pending the motion, on the 6th of May the defendant filed a defence, but omitted to serve a notice with it, that it had been filed without prejudice to the pending motion.

A defendant does not save his right to security for costs, by serving notice of motion for that purpose, if pending the motion he files a defence and omits to serve with it a notice that it is filed without prejudice to the pending motion.

*J. B. Dillon* in support of the application.

The Court will hear the motion as on the day on which the notice was served: *Stewart v. Ballance* (a). The service of the notice of motion is a sufficient special circumstance, within the 52nd General Order, to warrant the Court in making the order.

*W. O'Brien*, contra.

The question depends on the 52nd rule, which provides that "every such application shall be made before defence filed, unless the Court shall, under special circumstances, think fit to make such order after defence filed." The exception relates to the time of the making of the order. The defendant might have adopted the course usual in such cases, of serving a notice with his defence that it was filed without prejudice to the pending motion, which would have saved his right: *Taylor v. Low* (b); *Bush v. Curran* (c). The Court is now called on to engraft a new exception on the 52nd rule.

FITZGERALD, B.

The language of the rule is against the application.

Motion refused.

(a) 10 *Ir. Com. Law Rep.*, App. i.

(b) 3 *Ir. Com. Law Rep.* 22.

(c) 9 *Ir. Com. Law Rep.*, App. xxx.

\* Before FITZGERALD, HUGHES, and DEASY, BB.

T. T. 1862.  
*Exchequer.*

## TOM v. NAGLE.\*

May 30.

The house in which a person always sleeps, and not the house in the same city to which his letters are directed, and at which he transacts his business, is his "residence," within the meaning of the 9th section of the Common Law Procedure Act 1853.

A plaintiff, resident in Ireland at the time that an action is commenced, will not be compelled to give security for costs; but he will not get the costs of a motion to compel him to do so, if he has mis-stated his residence in the summons and plaint.

A summons and plaint, dated the 7th of April 1862, stated the residence of the plaintiff to be at "No. 7 Wicklow-street, in the city of Dublin." Upon a motion to compel the plaintiff to give security for costs, it appeared that, in answer to two persons, sent by the defendant to No. 7 Wicklow-street, to make inquiries there, relative to the plaintiff, the owner of the house said that the plaintiff was then in England, and never slept in that house when he was in Dublin. The affidavits of the plaintiff and others stated, that the plaintiff, for several years past, had been in the habit of residing for several months in each year in Dublin; that the nature of his profession, that of a mining captain, required a constant change of abode from Ireland to England; but that when he was in Dublin, he always had his letters addressed to, and transacted his business at, No. 7 Wicklow-street; but at the same time he always occupied a bedroom at No. 8 Chatham-street, Dublin.

Serjeant *Sullivan* and *W. M. Johnson*, in support of the motion.

The residence of the plaintiff is not truly stated in the summons and plaint. The plaintiff is an Englishman, residing at Padstow in Cornwall, he does not reside at No. 7 Wicklow-street, in either the legal or the etymological sense. The true test of this motion is, has the Court any proof that the plaintiff will remain in this country until the result of this action is determined? *Tambisco v. Pacifico* (a); *per Pollock, C. B.*

Serjeant *Armstrong* and *M. Morris*, contra.

The plaintiff swears that he is now in this country, and has been so for the five months preceding the bringing of this action; and that he intends to remain here until and after its conclusion. His residence here at the time of the bringing of the action will exempt him from giving security for costs: *Tambisco v. Pacifico*; *Allain v. Chambers* (b).

FITZGERALD, B.

Undoubtedly the summons and plaint did not state the real residence of the plaintiff; nor did it state, as his residence, a place where

(a) 7 Exch. 816.

(b) 8 Ir. Com Law Rep., App. vii.

\* *Coram FITZGERALD, HUGHES, and DEASY, BB.*

the defendant could obtain information regarding him. But now it appears that his real residence is at No. 8 Chatham-street, Dublin; and as it is sworn that he was there when the action was brought, and intends to remain there until after its conclusion, we refuse this motion, but without costs, as the plaintiff did not originally state his residence correctly.

T. T. 1862.

*Eschequer.*

TOM

v.

NAGLE.

## BARTLETT v. LEWIS.\*

June 2.

SERJEANT ARMSTRONG, *J. E. Walsh*, and *Bond Coxe*, on behalf of the plaintiff, applied for an order for a commission to examine witnesses in London. The witnesses to be examined were the cashiers and managers of several banking companies in London, whose books also were to be inspected.

It is no answer to an application for a commission to examine witnesses in London, that an action with the same object is pending in England.

Serjeant *Sullivan*, and *W. Sidney*, opposed the motion, upon the grounds that this motion was intended only to embarrass and annoy the defendant. The plaintiff was carrying on an action for the same object, in the Court of Common Pleas in Westminster, simultaneously with the present. The action in England was commenced first; and all the witnesses sought to be examined under the commission could be examined, together with the bank books, at the trial in London.

The granting of a commission to examine witnesses, is a matter *ex debito justitiæ*.

*J. E. Walsh*, in reply.

The plaintiff has a perfect right to abandon the action in Westminster, and proceed against the defendant in this country. Neither the expense, the distance at which the witnesses reside, nor the smallness of the amount at stake, are grounds for refusing the commission sought for: *Dye v. Bennett (a)*. The action in this country will be ripe for trial before the action in England.

FITZGERALD, B.

No doubt the defendant is embarrassed by the fact of the plaintiff proceeding against him in both England and Ireland; but the plaintiff may have good grounds for suing him in this country in preference to England. No application has been made to us to stay

(a) 9 Com. B. 281.

\* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

T. T. 1862.  
*Eschequer.*  
BARTLETT  
v.  
LEWIS.

proceedings in the cause. No doubt a commission is a less expensive course than to bring over here the witnesses and the bank books, under a *subpoena duces tecum*. As we cannot directly stop the issuing of the commission, we ought not to endeavour to do so indirectly.

Allow the order; the costs of the commission to abide the result of the trial. We are of opinion that both the defendant's affidavit, and the plaintiff's affidavit, contained imputations which ought not to have been made; therefore we give no costs of the motion to either party.

M. T. 1862.  
Nov. 7.

M'ANULTY v. NANTES AND OTHERS.

The concluding sentence of the 34th General Order 1854, applies to Counsel as well as to attorneys. When, in a summons and plaint the money counts did not commence in a new paragraph, the plaintiff was ordered to amend the summons and plaint on the file at his own cost. The Court will not impose costs upon a defendant ordered to amend a defence, read to and pleaded by leave of the Court.

*Per DEASY, B.*—Counsel ought to number each paragraph when drawing pleadings.

THIS was a motion to set aside defences, as embarrassing. The summons and plaint claimed £49. 19s., and in the first count sought to recover a deposit, in consequence of the defendants' not having deduced a good title to premises of which the plaintiff had been declared the purchaser at an auction. Without the use of a full-stop or a capital letter, the summons and plaint continued—"and "for moneys paid by the plaintiff for the use of the defendants at "their request, and for moneys received by the defendants for the "plaintiff's use." The indorsement of particulars was as follows:—"To amount of deposit, £26.; interest thereon, at £5. per cent., £1. 6s.; amount of plaintiff's costs, £22. 13s.; total, £49. 19s." The first defence stated that the defendants appeared and took defence, and had deduced a good title to the premises in the plaint mentioned; and for a further defence, by leave of the Court, the defendants said that "the seventh of the conditions of sale, subject "to which the messuage and premises in plaint mentioned were put "up for public auction, as in plaint mentioned, was not performed "or observed on the part of the plaintiff; and by reason of such "default the plaintiff is not entitled to maintain his present action; "and therefore they defend the action."

*J. O'Hagan*, for the plaintiff.

This defence is embarrassing, for it purports to answer all the counts in the summons and plaint, but leaves unanswered the money counts; *Garrett v. Waldron* (a); *O'Driscoll v. Croker* (b); *Dunsandle v. Finney* (c). The second defence, which relies upon a

(a) 9 Ir. Com. Law Rep. App. 24.

(b) Ibid, 29.

(c) 10 Ir. Com. Law Rep. 171.

breach of the seventh condition of sale, should set out the condition, and specify upon what breach thereof the defendant relies.

M. T. 1862.

*Exchequer.*

M'ANULTY

v.

NANTES.

*J. A. Phillips*, in support of the pleading.

If the defence is open to general demurrer, as the plaintiff contends it is, he should have proceeded by demurrer and not by motion: *Derrys and wife v. Byrne (a)*. These defences answer the whole action, as laid on the face of the summons and plaint, in which the money counts are not separated from the other count, for the deposit, in accordance with the 34th General Order 1854. The second defence was pleaded by leave of this Court, and its contents stated.

PIGOT, C. B.

Neither in the original summons and plaint, filed in the office, nor in the copy served on the defendant, are the counts contained in separate paragraphs, as directed by the 34th General Order 1854. I am well aware that the general opinion is, that those rules were framed with reference to proceedings in the offices of the Courts. That Order directs that "all writs of summons and plaint, &c. &c., shall be legibly engrossed or printed on parchment, fifteen inches square, bookwise, and shall contain thirty-six lines, or thereabouts, on each page, leaving a margin on the left hand side of the front and on the right hand side of the reverse, of at least two inches: and each cause of action in a summons and plaint, and each further plea of a defendant, shall be commenced in a new paragraph." It is clear that some of the above directions, such as the "printing" and the shape of the pleadings, refer to the mode in which the pleadings should be prepared when sent to the office to be there filed. But the rule concludes with a direction which is applicable, as well to the framing of the pleadings for the office, as to the form in which they should be drawn by Counsel—viz., each cause of action, and each plea, should commence with a new paragraph. Now, in this case, the first count commences, as every summons and plaint usually does, with a statement of the damages suffered by the plaintiff, concluding, "whereby the plaintiff hath lost the use of the money, &c. &c., and hath suffered damage to the amount of £49. 19s." Every professional man knows that that is a different count from the one which commences immediately afterwards, "and for moneys paid, &c. &c." These latter sentences state new grounds on which the plaintiff seeks to recover damages. These must be different counts; for as the plaintiff had before stated, in the first portion of his summons and plaint,

(a) 7 Ir. Com. Law Rep. 302.



**M. T. 1862.**  
*Eschequer.*  
**M'ANULTY**  
*v.*  
**NANTES.**

what the damages were which he sought to recover, if these concluding sentences do not state new causes of action, they are mere tautology. But the indorsement of particulars limits the defence to the first count only; for it could not for one moment be contended that interest was sought to be recovered under the head of either money paid for, or received by, the defendants. The so-called money counts follow the forms given in schedule C to the Common Law Procedure Act 1853; therefore I think the contents of the summons of plaint were evident to any professional person, although the plaintiff committed a misprision in the office, which he must rectify at his own cost. Undoubtedly the defendant ought to have set out the default made by the plaintiff in the condition of sale. The defence must be amended, but without costs, since the Court misled the defendant, in permitting (very inadvertently, I admit) that second defence to be pleaded.

**HUGHES, B.**

The General Orders are intended for the direction of Counsel, as well as solicitors, attorneys, and the officers of the Court.

**DEASY, B.**

The 34th General Rule is intended for the direction of Counsel, who would do well to number each paragraph when drawing pleadings. It is very necessary that each count in the summons and plaint should be distinct, so that unprofessional persons may clearly understand how much, and upon what grounds, they are called upon to pay.

Both parties to amend; no costs given.

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**CORAH v. WARD and others.\***

**Nov. 18.**

Where two of three defendants had taken defence, the third being out of the jurisdiction, the Court, refused, with costs, a motion to change the venue, made by the defendants, who had taken defence, upon the ground that the motion was premature, the cause not being at issue.

THIS was an action on a bill of exchange, against three joint executors of the drawer of the bill. One of the defendants resided in England. Service upon him was alleged in the indorsement upon the summons and plaint to have taken place by serving one of his co-defendants with a copy of the writ for him. No order for substitution, or to declare such service good, had been made; nor had a

\* *Coram* PIGOT, C. B., HUGHES, and DEASY, BB.

*nolle prosequi* been entered against him. A motion was now made by the defendants who had appeared, to change the venue. It was opposed upon the ground that the application was premature, the cause not being at issue.

The motion was refused with costs, on the grounds stated in the margin.

M. T. 1862.  
*Exchequer.*  
CORAH  
v.  
WARD.

## CLINTON v. HENDERSON.

H. T. 1863.  
Jan. 30.

THE summons and plaint in this case stated that the plaintiff was before and at the time of the committing of the said grievances, &c. &c., a sub-constable in H. M. constabulary force for Ireland, and had, as such sub-constable, always conducted himself loyally and quietly, and according to the rules and regulations of the said constabulary force; and that before, &c. &c., the plaintiff, as such constable, was sent by the Government, together with other members of said force, upon temporary duty, to Newtownards, in the county of Down; and the defendant afterwards, in a certain newspaper, called the *Belfast News-letter*, falsely and maliciously printed and published of the plaintiff, in his character of sub-constable, the false, scandalous and malicious words following, that is to say:—  
“Why was an additional police force sent to Newtownards?—To the editor of the *Belfast News-letter*—Sir, I take the liberty of asking, through the medium of your very influential paper, for what purposes were the additional police sent to Newtownards? Were they sent to keep order? or were they sent to lead to a disturbance on the part of our always peaceful inhabitants? It is quite evident, from what has occurred here within the last few days, that their coming here has not been attended with any good. On Saturday last, the 8th instant, a number of those policemen [meaning thereby the plaintiff, and other members of the said constabulary force, who had newly arrived from the Phoenix-park, in number, eight or eleven] marched in pairs in the direction of the end of the town, passing through Little Francis-street and Zion-place. When in Little Francis-street, one of the party who, it is quite evident, has played a fife more than once, pulled out one of those instruments, and immediately commenced playing a tune very grating on the ears of the inhabitants of that peaceful locality. [Meaning thereby that the plaintiff was one of a party of the constabulary who caused party tunes to be played by one of such

In an action of libel, a defence that the alleged libel was a fair comment in a newspaper upon the plaintiff's acts, must allege that the article was a fair comment upon the plaintiff's conduct on the occasion there-in referred to.

The plea in *The Earl of Lucan v. Smith* (26 Law Jour., Exch., 94, note 2), *Bullen and Leake's Prec. in Pleading*, 2nd ed., p. 614, disapproved of.

The introduction of untraversable averments into the summons and plaint, such as laudatory statements relative to the plaintiff, is a very objectionable practice, and tends to mislead juries from the real questions in dispute.

H. T. 1863. *Eschequer.*  
 CLINTON  
 v.  
 HENDERSON.

“party in the public streets of the town of Newtownards, in such a manner as was calculated to produce a disturbance and breach of the peace]. Saturday being the market-day, many farmers, and especially the inhabitants of Little Francis-street and Zion-place, flocked to see this novel procession. They proceeded to Conlig, which lies between Newtownards and Bangor; and along the road they excited the passers by, the farmers who were returning home from the market, and the country cottiers, by their noisy unmusical entertainment. They stopped at Conlig, and got refreshed with some spirits, which however only made matters worse; for they fell out amongst themselves on their way home.”

“[Meaning thereby that the plaintiff, then being a member of the constabulary force, did upon said occasion, with other members of said force, drink ardent and intoxicating spirits, in a public-house in the village of Conlig; and that the said party of constabulary, of which party plaintiff was one, did upon said occasion, upon their return from said village to Newtownards, by reason of having drunk intoxicating drinks, quarrel amongst themselves].

“When they arrived in Newtownards, they accosted some of the inhabitants of Zion-place with expressions which would only be uttered by the most profound advocate of Ribbonism, and enraged, and not unjustly, the inhabitants of that part of our town.” [Meaning thereby that the plaintiff, amongst others of said members of the constabulary, belonged to the unlawful body or association usually known as Ribbonmen].—“Your space will not allow me to describe their conduct along the road home, which was infinitely worse than what I have already described on their entrance into the town. These are facts which should call for investigation on the part of our rulers; and it will certainly not be the fault of the Lord Lieutenant and police if they do not succeed in kicking up a row.”

“[Meaning thereby that the conduct of the plaintiff, amongst others of said members of the constabulary force, was, upon that occasion, of a disorderly character, calculated to create a disturbance and a breach of the peace, and that such conduct would, upon such occasion, have produced a disturbance and breach of the peace, but for the forbearance of the other persons who were present when such conduct took place].—“I have every hope however that the inhabitants of this town will show their good sense, and not be entrapped into hostile collision with the authorities.—I am, Sir, your very obedient servant—‘A Lover of Freedom’—July 9th, 1862.” [Meaning also by the said libel that the plaintiff, as a member of said constabulary force, had been guilty of conduct unbecoming and improper in a member of the constabulary, and

"contrary to his duty as a sub-constable; and that the plaintiff  
"was unfit to remain a member of said force."

H. T. 1863.

Eschequer.

CLINTON

v.

HENDERSON.

Special damages, in consequence of the plaintiff's dismissal from the constabulary force.—Defences; first, a denial of the defamatory sense alleged; secondly, "that the letter above mentioned was  
"and is a fair and *bona fide* comment upon the *several matters and premises therein contained and referred to*, and upon the conduct  
"of the said party of the constabulary force of Ireland *therein mentioned*," &c. &c.

*C. Palles*, for the plaintiff, moved that the second defence be set aside, upon the ground that the acts and scenes commented on by the letter were not identified with what actually occurred. The letter, while a fair comment upon what was described therein, might not be such upon what actually took place.

*H. Joy* (with whom was *J. Norwood*), in support of the defence, cited *Archer v. McCaldin (a)*. The second defence follows *verbatim* the plea set out in *The Earl of Lucan v. Smith (b)*, referred to as a precedent for the plea that an article in a newspaper is a fair comment, in *Bullen & Leake's Precedents in Pleadings*, 2nd ed., p. 614.

The COURT ordered the plea to be amended, by the substitution of the following words—"Was and is a fair and *bona fide* comment  
"upon the conduct of the said party of the constabulary force of  
"Ireland, *on the occasion therein referred to*," &c. &c.

The LORD CHIEF BARON added, that the practice of introducing untraversable averments into the summons and plaint, in the shape of laudatory phrases relative to the plaintiff, was very objectionable. The real questions in dispute here were the dismissal of the plaintiff, and the cause of it. It was often difficult to keep the real facts at issue before the jury, who were liable to be misled by the comments of Counsel for the plaintiff, upon topics introduced by the ingenuity of the pleader. The Courts should strike these untraversable averments out of all pleadings which come before them.

(a) 6 Ir. Jur., N. S., 34.

(b) 26 Law Jour., Exch., 94, note 2.

H. T. 1862.  
Common Pleas.

COPLAND v. ARMSTRONG.

(Common Pleas).

Jan. 13.

Actions  
 brought under the Summary Bills of Exchange Act (24 & 25 Vic., c. 43) are subject to the provisions of the 97th section of the Common Law Procedure Act of 1856; and if the sum recovered be less than £20, and both parties reside within the same civil-bill jurisdiction, the plaintiff will not be entitled to costs.

MOTION that the plaintiff or his attorney be ordered to refund the sum of £1. 5s. 0d., paid by the defendant, under protest, in respect of costs. The action was one brought under the Summary Bills of Exchange Act, to recover the sum of £10, being the amount of a bill of exchange, indorsed by the defendant to the Royal Bank; the plaintiff being the public officer of the bank.

The summons and plaint contained also a claim of two shillings and sixpence for the expense of noting.

The full amount of the demand, namely, £10. 2s. 6d., was tendered on behalf of the defendant; but the attorney for the plaintiff refused to accept it, unless a sum of £1. 5s. 0d. was paid for costs. The defendant paid, under protest, the whole sum demanded, in order to avoid judgment being marked against him.

The defendant and his attorney made affidavits in support of the motion. The statement by the defendant as to residence was, that his place of business was in the house No. 11 Nassau-street, in the city of Dublin, and that he slept at Tolka Lodge, in the county of Dublin; and that the plaintiff's place of business was in Foster-place, in the city of Dublin, and that he slept at Monkstown, in the county of Dublin.

*Henry Fitz Gibbon*, for the motion, referred to the 40th and 65th sections of the 13 & 14 Vic., c. 57 (the Civil-bill Act), and also to the 97th section of the Common Law Procedure Act 1856, as re-enacting the provisions of the former section.

*Exham*, for the plaintiff.

This action is brought under the recent Summary Bills of Exchange Act, and could not have been brought in the Civil-bill Court. The provisions of the 97th section of the Common Law Procedure Act 1856, do not apply to this case. This is not a mere question of £1. 5s. 0d. The question is, whether banks are to have the benefit of the provisions of the 24 & 25 Vic., c. 43, with respect to bills of exchange under £20. This action comes properly under the 5th section, which gives the expense of noting to the plaintiff. The plaintiff therefore recovered an item which he could not have recovered in the Civil-bill Court: *Byles on*

*Bills*, p. 243. According to the rules settled by the Judges the plaintiff here is entitled to £1. 5s. 0d. for costs.—[CHRISTIAN, J. <sup>H. T. 1862.</sup>  
<sup>Common Pleas.</sup>  
COPLAND  
v.  
ARMSTRONG  
That rule must be read in conjunction with the 97th section of the Act]—*Exham*. The words of the 97th section are, "If, in any action, &c., the plaintiff shall recover a less sum," &c. Money paid is not a sum recovered in the action: *Chambers v. Wills (a)*.

*Fitz Gibbon* was not called on to reply.

MONAHAN, C. J.

We do not think there is any occasion to allow this motion to stand for further consideration. We entertain no doubt but that the Summary Bills of Exchange Act must, according to its true construction, be read in conjunction with the Common Law Procedure Act, and as if incorporated with it. If a party choose to avail himself of the benefit of the Bills of Exchange Act, and proceed for a sum under £20, he must be satisfied, in any case, with only half costs; and if both parties reside within the same civil-bill jurisdiction, with no costs. We are therefore clearly of opinion that the plaintiff ought to have accepted the amount sued for, without the £1. 5s. 0d. for costs; but not having done so, the defendant must be recouped that amount, together with the costs of this motion.

Order accordingly.

(a) 1 Eng. Jur., N. S., 475.

### BELL v. BELL and others.

Jan. 17.

THIS was an application, on notice at foot of summons and plaint, pursuant to the 75th section of the 23 & 24 Vic., c. 154 (Landlord and Tenant Act 1860), that the defendant should, within six days from the date of the application, enter into recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages, and mesne profits, which should be incurred

A plaintiff, in an action of ejectment on the title, brought to recover the possession of premises, where the lease has determined, is

not entitled to security for costs from the defendant, under the 24 & 25 Vic., c. 154, s. 75, unless he actually produce, upon the motion, the lease or counterpart; and it is not sufficient for him to deny that a counterpart ever existed, and to make it appear, by affidavit, that the defendant is in possession of the lease, and to require him, by notice, to produce same.

H. T. 1863.  
Common Pleas

BELL  
v.  
BELL.

by the plaintiff in the pending action of ejectment on the title. The notice further required the defendant to produce, on said motion, a certain indenture of lease, dated — day of — 1845, from the plaintiff to the late Mary Bell; and also an assignment or conveyance of the lands, dated 27th October 1857. The motion was grounded on the plaintiff's affidavit, which alleged the making of a lease of the lands of Crossteely, in the county of Tyrone, to Mary Bell, for her life, which she afterwards assigned to defendant, and died, on or about the 8th of April 1862; and that possession had been demanded of said lands. The deponent further stated that neither the said indenture of lease or assignment, nor any counterpart or counterparts of them, or either, is or are now, or ever were, in the custody or possession of deponent; but that they were now, as he believed, in the custody of the defendant, or some person on his behalf; and that said indenture of lease was produced on his behalf in the month of December last, at a trial, in the Court of Probate, between deponent and said defendant, as to an alleged will of said Mary Bell; and that, on that occasion, an assistant of plaintiff's attorney took the particulars of said lease, which is mentioned as having been dated in 1845, without stating day or month.

*Dowse*, for the plaintiff, now moved, pursuant to the 75th section of the Landlord and Tenant Act, for security for costs.

The plaintiff excused the production of the lease or counterpart, by swearing that he never had a copy, and by calling upon the defendant, by notice, to produce the original.—[MONAHAN, C. J. In order to carry your motion, you must get a new Act of Parliament. The clause of the Act to which you refer is this:—"It shall be lawful for the landlord, *producing* the lease or other instrument regulating the terms of the tenancy, or some counterpart or duplicate thereof, and proving the execution of same, &c." This is not such a case as the Legislature contemplated.—BALL, J. We have no power, on the present motion, to compel the defendant to produce the lease.] The possession of the lease is not denied at the other side.—[KEOGH, J. The terms of the notice were merely that you would apply, on the first opportunity, for security for costs.]

*S. Y. Johnstone* contra, applied for costs.

*Per Curiam.*

This motion must be refused, with costs.

H. T. 1863.  
*Common Pleas.*

## MOORE v. M'ELROY.\*

March 14.

THIS was an application that the plaintiff might be at liberty to mark judgment against the defendant, as in the case of default, notwithstanding that a defence had been filed, on the ground that notice of the filing of the defence, and a copy thereof, were not served on plaintiff's attorney, pursuant to the provisions of the Common Law Procedure Act, until after the time limited by the said Act had expired, and after the plaintiff had proceeded to mark said judgment. The action was brought to recover a sum of £27. 18s. 3d., for goods sold and delivered by the plaintiff to the defendant. To this the defendant pleaded that the goods sold and delivered were of the value of £10, and no more; and that he had satisfied and discharged the plaintiff's claim in respect thereof, by payment before action, in the manner therein indorsed:—

INDORSEMENT:—"1856. To amount of cash paid to plaintiff, £10."

It appeared by an affidavit, made by the attorney for the plaintiff, that the summons and plaint was served on the 13th of February; and consequently that the last day for pleading to it was the 27th of the same month. That no notice of the filing of a defence, nor was a copy thereof, served on him, or at his office, on the 27th of February, or previously thereto; and that he, on the 28th of the same month, caused the necessary forms to be filled up for marking judgment by default, and swore the necessary affidavit for that purpose, and then sent his clerk to Court to mark judgment by default; when said clerk, before demanding from the proper officer a certificate of no defence being filed, as required in such cases, made search for defence; and on such search he discovered that a defence had been filed on the 26th of February. That, up to the time of said defence being so discovered to have been filed, he had not received from the defendant or his attorney any notice or intimation whatever of the filing thereof. That his clerk informed him that, on Saturday the 25th of February, he remained in his office until after the hour of half-past five in the afternoon, and that no copy of the defence, or notice of filing same, was served up to that hour; but that, on Monday the 2nd of March, he was handed by his said clerk a notice of filing said defence, and a copy thereof, dated the 26th of February, which had been, as he had been informed, found in the letter-box of the hall-door to his registered residence, either late on

Where the defendant in a personal action filed his defence within the time required by the 43rd section of the Common Law Procedure Amendment Act 1853 and omitted, for some days afterwards, to serve a copy thereof; but did so before the plaintiff had given notice of a motion for liberty to mark judgment—*Held*, that, notwithstanding that the plaintiff had been prevented from marking judgment, in consequence of the filing of the defence though without notice, that defence became regular as soon as the copy was served; and the plaintiff could not afterwards object to it.

\* *Coram* DEASY, B., sitting in Consolidated Chamber.



H. T. 1863.  
*Common Pleas.*

MOORE

v.

M'ELROY.

Saturday evening, or on Monday morning. The clerk of the attorney for the plaintiff made an affidavit corroborating these facts. The plaintiff also made an affidavit, to the effect that the sum claimed by the writ of summons and plaint was *bona fide* due to him, and that the statement in the defence that it had been discharged by a payment of £10 was untrue; and that he believed the defence was filed for the purpose, not of *bona fide* disputing the debt claimed by him, but of deterring him from prosecuting his action, by reason of the expense to which he would be put by a contested record; the defendant being, as he believed, in circumstances of very doubtful solvency.

In answer to these affidavits, the Dublin agent for the attorney for the defendant, and his clerk, made a joint affidavit, in which it was stated that the defence was filed on the 26th of February; and that a copy and notice were prepared for service on the same day, but escaped being served until the 28th of February, by a mistake.

*Purcell*, in support of the motion.

There was here a clear violation of the provisions of the Common Law Procedure Act. The last day for pleading was the 27th of February, and, on that day, no notice of a defence having been filed was served. The fact of a defence having been filed, without notice, on the 26th of February, ought to be treated as a nullity. By the 45th section of the Common Law Procedure Act of 1853, it is enacted that notice of the filing and defence, together with a correct copy thereof, shall be served on the plaintiff's attorney; "and such defence shall be considered as filed as on the day on which such notice and copy shall be served." No notice therefore of the filing a defence having been served on the 27th, which was the last day to plead, the plaintiff was entitled to mark judgment on the 28th. In consequence of the defence filed on the 26th, the officer would not allow him to do so. The Court should now set aside that defence, and let judgment be marked for the plaintiff as by default. This defence was merely pleaded for the purpose of gaining time. That appears by the affidavit of the plaintiff.

*Kaye*, contra.

This motion ought to be refused; there has been no substantial irregularity on the part of the defendant; and the provisions of the Common Law Procedure Act have been literally complied with. It is true that a defence is to be considered as filed only on the day on which notice of the filing shall be given to the plaintiff; but it is also the case that, under the 39th section of the Common Law Procedure

Act 1853, the defendant may file his defence *at any time before judgment*. The plaintiff could not under any circumstances have marked judgment until the 28th; and the defence must be taken as filed on that day. If the defence had been handed to the officer at any time before marking judgment on the 28th, he would have received it. This defence must be taken as filed in time on that day, although notice of the filing was not served until evening; but the law does not regard fractions of a day. The affidavit of the plaintiff is of no importance. The Court will not try the merits of an action on affidavits. The object of this defence could not have been for the purposes of delay. The plaintiff had ample time, after receiving notice of the filing of it, to serve notice of trial for the Assizes, but did not do so. This motion should therefore be refused.

H. T. 1863.  
Common Pleas  
MOORE  
v.  
M'ELROY.

*Purcell* was heard in reply.

DEASY, B.

I cannot set this defence aside, as it appears to be perfectly regular. I must therefore refuse the application.

Motion refused, with £3 costs.

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COLLINS v. THOMPSON.

M. T. 1862.  
Nov. 24.

H. T. 1863.  
Jan. 15, 20.

THIS was a motion on behalf of the Rev. W. C. R. Flint, a petitioner in a cause petition matter now pending in the Court of Chancery, wherein the defendant was respondent, that the garnishee order, pronounced in this cause on the 18th of November, making

A judgment creditor obtained a garnishee order to attach certain rents, to which the judgment

debtor was alleged to be entitled. Prior to the obtaining of the absolute order for payment, the plaintiff ascertained that a judgment mortgagee had filed a cause petition, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, against the defendant, under which an order of reference had been made for the appointment of a receiver. No notice of the motion had been served upon the mortgagee, and no one appeared to resist the making absolute of the order, nor was the Court informed of the above fact. The mortgagee subsequently, having moved to set the order aside—*Held*, that it was the duty of the plaintiff to have apprised the Court of the existence of the judgment mortgage, and proceedings thereunder; and that, without imputing *mala fides* to the plaintiff, it amounted to such a suppression of fact on his part as entitled the mortgagee to have the order set aside, with costs, without prejudice to any further application the plaintiff might be advised to make, to have the primary garnishee order made absolute.

The plaintiff having accordingly moved *de novo* to this effect, upon notice to the mortgagee—*Held*, that the existence of a judgment mortgage affecting the defendant's lands was, *per se*, sufficient to disentitle the plaintiff to obtain an absolute order for the payment of the rents.

**M. T. 1862.** absolute the conditional order of the 10th of November last, be set aside, said order of the 18th of November last having been obtained subsequent to the date of the order of Master Litton, made in said Chancery cause petition matter, ordering a receiver to be appointed over the lands in the occupation of the tenants, who were directed by the said order of the 18th November to pay to the plaintiff in this cause the respective sums due by them for rents to the defendant. It appeared by the affidavit of Mr. Connor, the attorney and solicitor of the Rev. Mr. Flint, that he recovered a judgment in the Court of Queen's Bench against the defendant, on the 30th April 1862, as part of a bond and warrant, dated 14th November 1860, in the penal sum of £2000, to secure repayment of £1000, money lent by plaintiff to defendant, with interest at the rate of £5 per cent. per annum; which judgment was, on the 2nd May 1862, duly registered as a mortgage against the interest of defendant in certain lands and premises in Louth, and, amongst others, the lands of Dillonstown and Annagasson, situate in the barony of Ardee, in said county; that, upon the 28th May last, defendant presented a petition to the Landed Estates Court, for the sale, amongst others, of Dillonstown and Annagasson, upon which there were sundry other incumbrances besides Flint's judgment mortgage; that Mr. Flint, on the 19th July last, filed a cause petition, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, praying, amongst other things, the appointment of a receiver over said premises, upon which petition the usual order of reference was made on the 25th July 1862; that, on the 7th November last, Master Litton made an order for the appointment of a receiver over said lands, and that the several tenants on said lands should pay their respective rents and arrears to the receiver so to be appointed, upon his entering into recognizance, as in such cases usual. This order was, on the 14th November, duly served upon the several tenants of said lands of Dillonstown and Annagasson. Deponent stated his belief that, before the making of the order of the 18th of November, the plaintiff or his attorney was aware of the making of the said order for the appointment of a receiver, and that notice thereof had been served upon said tenants; and that his attorney, before the making of the order of the 18th of November, to make absolute the conditional order of the 14th November, had in his possession a copy of the said notice so served upon the said tenants. A receiver was subsequently appointed, but had not yet perfected his recognizance. Deponent also explained the reason of his client not having intervened upon the notice to make absolute the garnishee order. It appeared by the affidavit filed by the plaintiff, to ground

**M. T. 1862.**  
*Common Pleas*

**COLLINS**

**v.**

**THOMPSON.**

the garnishee order, that she had recovered two several judgments against the defendant in this Court, on the 6th of June 1862—the first for the sum of £274. 5s. 7d., and the second for £126. 3s. 2d., both of which remained due; that the defendant was and is possessed in fee-simple of the lands of Dillonstown and Annagasson, in the county of Louth, let to the therein undermentioned tenants from year to year, who reside thereon; each of whom was, and still is, justly and truly indebted to the said defendant in the amount of one full half-year's rent of their respective holdings under said defendant, up to and for the 1st day of November 1862; each of which several tenants resides in Dillonstown and Annagasson, in the county of Louth, within the jurisdiction of the Court, &c. &c. The affidavit then set out a list of the tenants, and the amount of the several arrears of rent; and made out a case for substitution of service of the order upon the defendant, who was out of the jurisdiction.

M. T. 1862.  
Common Pleas  
COLLINS  
v.  
THOMPSON.

The absolute order, made on the 18th of November, directed the tenants, twenty-nine in number, to pay to the plaintiff the several sums set opposite to their respective names, within ten days from the service of the order, in part discharge and satisfaction of plaintiff's judgment debt; and that said several parties do have credit respectively against the defendant for the said several sums so directed to be paid over by them.

*Acheson Henderson*, on behalf of the judgment mortgagee.

The order ought not to stand, inasmuch as the debt, in order to be attached, ought to have been due to the defendant; whereas the estate in the land had been previously transferred to a creditor of the defendant. The order of reference, which was made on the 25th June last, bound all the arrears of rent: *Hollier v. Hedges* (a). These facts ought to have been stated to the Court when the absolute order was asked for. He also cited *Tilbury v. Brown* (b); *Dingley v. Roberts* (c).

*M. Blain and Hamill*, contra.

The plaintiff had no notice whatever of the facts at the time of applying for the original garnishee order. It is true that the plaintiff heard of the Chancery proceedings prior to the making absolute of the order; but it is submitted that the rents were not bound in the hands of the tenants until service of the order for the payment of the rents to the receiver, which had not been made at that time.—[MONAHAN, C. J. Does that rule apply to the case where

(a) 2 Ir. Chan. Rep. 370.

(b) 30 Law Jour., N. S., Q. B., 46.

(c) 2 Eng. Jur., N. S., 1145.

M. T. 1862.  
*Common Pleas*

COLLINS

v.

THOMPSON.

the person obtaining such an order has already a legal title to the rents?—KEOGH, J. The rents ceased to be due to the mortgagor after the registration of the judgment.]—Flint was only an equitable mortgagee. The plaintiff's judgment was also registered as a mortgage. It did not occur to the Counsel for plaintiff that the existence of the order in the Chancery matter was, under the circumstances, a material fact, which ought to have been mentioned to the Court; as, in his opinion, it did not affect the rights of the parties.

MONAHAN, C. J.

We are of opinion, without being called upon at present to enter into the question of priorities, that the absolute order was obtained by the actual, though not intentional, suppression on the plaintiff's part of a material fact; and that, when this order was being obtained, it should have been mentioned to the Court that this order had been obtained. Therefore, while we leave the effect of this to be argued at another time, we shall merely at present set aside the absolute order, with costs, allowing the conditional order to stand; and this will not prevent the plaintiff from moving to make this order absolute against Mr. *Henderson's* client.

H. T. 1863.  
Jan. 15.

On the 9th of December last, the plaintiff accordingly served notice on Mr. Flint, and others, to make absolute the said conditional order of the 4th of November last. The plaintiff, in support of the motion, filed a further affidavit, stating the circumstances under which she had recovered judgment against the defendant. The affidavit also stated, that Charles Dougherty, another judgment creditor of defendant, on the 12th of June 1862, obtained a garnishee order in this Court against the said tenants for their rents due on the 1st of May last, under which he received the rents, up to which time the defendant had been in receipt thereof; that Mr. Flint is the half-brother of defendant, and never received interest on foot of his said judgment; that the judgments, so obtained by deponent against defendant, were duly registered as mortgages against the defendant's lands on the 5th of July 1862, and deponent some four or five days afterwards filed her cause petition, praying for a receiver over said lands, but as the Court of Chancery was not then sitting, the matter could not be proceeded with until after the Long Vacation; that deponent had no notice of the proceedings in the petition matter of Mr. Flint, and never heard of Master Litton's order for the appointment of a receiver, or notice of the execution of such order, until informed thereof by the affidavit of the attorney of Mr. Flint; the affidavit also contained charges of collusion.

Mr. Flint in reply filed an affidavit denying the last mentioned charges, and alleging that he had taken the proceedings for the *bona fide* purpose of securing the rents and profits of the defendant's estates for the mortgagees and prior incumbrancers thereon, and not allowing the same to be diverted from their proper legal course of payment.

H. T. 1863.  
Common Pleas  
COLLINS  
v.  
THOMPSON.

The Court, pending the motion, having desired further information respecting the various incumbrances affecting the property, and their respective priorities, a statement was prepared, by which it appeared that there were three mortgages by indenture for sums amounting in the whole to £8000, prior to the several judgment mortgages; that there was one judgment mortgage registered the 14th of February 1861, prior to that of Mr. Flint, between which latter and that of the plaintiff several intervened. In addition to the dates mentioned in the foregoing affidavits, it appeared that on the 5th of December 1862, the receiver's recognizance was duly enrolled, and the usual order made upon the tenants, which was duly served on the 5th of December 1862.

*Mr. Blain* (with whom was *C. R. Barry*) now moved to have the order made absolute, and contended that the intervening mortgage creditor was not entitled to the rents. In order to bind the rents, the reversioner should give notice to the tenant: *Moss v. Gallimore* (a); *Waddilove v. Barnett* (b). The mortgagor might look to the tenants for his rent, and his right could not be divested by the subsequent interference of the mortgagee.—[*MONAHAN*, C. J. Do you contend that mortgagee could not bring an action for the rent?—The right of action vested in the defendant in November, and that could not be divested; when the rent is paid to the mortgagor, no account can be demanded: *Wilton v. Dunn* (c). But Mr. Flint is only the mortgagee of the equity of redemption.—[*MONAHAN*, C. J. No doubt if the rents had been actually received by the landlord, the mortgagee would have had no right, but cannot he stop them, before they are due, from going into the landlord's pocket? Suppose that the landlord had assigned the rents for value, could not the mortgagee stop them before the assignee received them?—It is submitted that the order of the 4th of November, for the attachment of the debt, bound the rent in the hands of the tenants. It has been held that such an order has the same effect as an execution levied on chattels: *Holmes v. Tatton* (d).—[*CHRISTIAN*, J. Your argument pro-

(a) 1 Sm. L. C. 310.

(c) 17 Q. B. 297.

(b) 2 B. & C. 538.

(d) 5 El. & Bl. 65.

H. T. 1863.

Common Pleas

COLLINS

v.

THOMPSON.

ceeds upon the assumption that the mortgagor had a right to recover the rent; but by the registry of the judgment, Mr. Flint made the tenants his debtors, and then, before you get the rents into your own pocket, Flint intervenes. The very existence of a prior mortgage is ignored by your proceedings.—MONAHAN, C. J. If the rents had been paid to you before the interference of the mortgagee, you might have kept them.]—It is submitted that so long as the mortgagee does not interfere, the mortgagor is in the position of the landlord of the tenants.—[KEOGH, J. If the mortgagee becomes active, cannot he divest the rights of the mortgagor?]—Not as against prior rents.

*J. Brooke and A. Henderson, contra.*

It is plain that all the rents accrued due the 1st of November last, and that Mr. Flint's mortgage was completed on the 2nd of May. The assignment conveyed the rights of the assignor to the assignee; otherwise a man might sell his estate and afterwards recover the rents from tenants from year to year. If indeed the tenants pay their former landlord the rents, without notice of the assignment, they are protected as against the mortgagee; but *Moss v. Gallimore* decides that where leases are made before the mortgage, the mortgagee is assignee of the reversion. Therefore the rents which accrued after the 2nd of May clearly belonged to the judgment creditor. None of the tenants were indebted to the judgment debtor. The rents moreover were due from the date of the order of reference, which was duly served upon the tenants. The rents were thus attached both at law and in equity. This Court will not interfere with the jurisdiction of the Court of Chancery.

*C. R. Barry, in reply.*

Notice of the mortgage was necessary in order to affect the tenants: *Burrowes v. Graydon* (a). No one can set up the *jus tertii* but the tenant himself. As between the plaintiff and the creditor intervening here, the garnishee order is good.

MONAHAN, C. J.

We are of opinion in this case, that it is perfectly plain that the rent was not due to the judgment debtor; it was clearly due to a third person; and then the only question is, whether the plaintiff will be allowed to attach for his demand against the judgment debtor, a debt which is due to a third person. We cannot entertain

(a) 1 D. & L. 218.

any doubt whatever upon this subject. It is perfectly plain that when the mortgage was effected subsequent to the tenancy, it operated as an assignment of the reversion. We must, therefore, refuse this motion with costs.

H. T. 1863.  
Common Pleas  
COLLINS  
v.  
THOMPSON.

## BLOOMFIELD v. JOHNSON and another.

Jan. 16, 17,  
19.

THIS was an application that the conditional order for a new trial, obtained by the defendants on the 8th of November last, might be set aside, on the ground that same was granted improvidently, and on the ground of same having been obtained after the defendants had taken a bill of exceptions at the trial of the cause, and after the defendants had furnished a bill of exceptions, and without then having elected to abandon said bill of exceptions; and on the ground that said new trial order is conversant about a matter of law, and not of discretion.

This was an action for the alleged disturbance of the plaintiff's right of fishery. The summons and plaint contained several causes of action, and the jury found some of the issues in favor of the plaintiff, and others in favor of the defendants. Both parties tendered a bill of exceptions to the ruling of Hayes, J., before whom the case was tried at the last Summer Assizes for the county of Londonderry. The defendants also, on the 8th of November last, obtained a conditional order for a new trial, upon the ground misdirection, and of the verdict having been against evidence.

The plaintiff thereupon served the usual notice of showing cause against the conditional order. The defendants, upon the 5th of January, served a notice upon the plaintiff requiring him to attend before Mr. Justice Hayes, on the 8th of January inst., to settle the defendants' bill of exceptions. In reply to the above notice, the plaintiff served a notice in reply, as follows:—"In reply to your notice of the 5th of January inst., I wish to give you distinctly to understand, that out of respect for the Hon. Judge Hayes's summons I shall attend before his Lordship on Thursday the 8th of January inst., but that I do so protesting against the course which you have pursued in relation to this case. The summary of the facts, and which I shall verify by affidavit, is as follows:—At the trial of this cause, your Counsel tendered a bill of exceptions; and, on the first summons for settling the draft bill of exceptions, which took place on the 8th day of

Where a party tenders a bill of exceptions, and furnishes a draft of same for settlement, the Court will not afterwards grant him a conditional order for a new trial, for misdirection, unless he waive the bill of exceptions.

Where the Court improvidently granted such a conditional order, without requiring the party to abandon the bill of exceptions, upon his subsequent refusal to do so, they discharged the order, with costs.

Where such an order has been granted, the proper course for the other party to adopt is, to move to set it aside, and not to show cause against it, in the ordinary way.



H. T. 1863. " November 1862, your leading Counsel, Mr. *Brewster*, stated that  
*Common Pleas* " the papers had been sent to him so recently he had not time to  
 BLOOMFIELD " peruse them ; whereupon plaintiff's Counsel at once agreed to an  
 v. " adjournment of the summons, and which summons was adjourned  
 JOHNSON. " accordingly. Your next step was to obtain a conditional order for  
 " a new trial, on the self-same legal objections which were embodied  
 " in your bill of exceptions ; and upon this being stated to plaintiff's  
 " Counsel, it was thought highly unreasonable and oppressive upon  
 " the suitors of the Court that you should endeavour to avail your-  
 " self of two modes of proceeding, so inconsistent and contrary to  
 " the practice of the Court, as a new trial motion and a bill of excep-  
 " tions in the same matter ; and accordingly, when the parties met  
 " on the postponed summons, plaintiff's Counsel pointed out the  
 " unreasonableness of the defendant's putting the plaintiff to the  
 " expense of a settlement of a bill of exceptions, when, if the new  
 " trial motion were decided in his favor, there could be no prosecu-  
 " tion of the bill of exceptions, and when he had no right to said  
 " double remedy ; and the defendant's Counsel, saying that he  
 " thought that what plaintiff's Counsel urged was reasonable, did  
 " not proceed further to settle the bill of exceptions, and intimated  
 " that he would consult his attorney, and apprise the parties, within  
 " two days, as to whether the defendant would proceed with his bill  
 " of exceptions, and again require the learned Judge to grant a  
 " meeting. I have now to remind you that no intimation, such as  
 " promised, was made ; and that the conditional order, having been  
 " got out, a notice to show cause having also been given, I ascer-  
 " tained from the officer of the Court that the 91st order had not  
 " been complied with by the defendant ; and the plaintiff's Counsel,  
 " upon my instructions, brought the matter under the consideration  
 " of the Court, in order to endeavour to have the new trial motion  
 " disposed of within the Term. In the meanwhile, you do not  
 " appear to have taken any step to expedite the getting in of the  
 " report ; and now, all of a sudden, on the 5th of January, you  
 " serve notice requiring an attendance before the Judge, to settle the  
 " defendants' bill of exceptions. On the part of the plaintiff, I am  
 " advised that this course of a double proceeding is quite at variance  
 " with the law, and that you cannot have this two-fold method of  
 " proceeding. It is a matter of perfect indifference to the plaintiff  
 " which course you shall elect, namely, new trial motion or bill of  
 " exceptions, but the plaintiff objects to be twice harassed on the  
 " same ground ; and therefore I call upon you distinctly to inform  
 " me whether you have abandoned your new trial motion ; and if  
 " you answer in the affirmative, then I shall give you every facility  
 " in proceeding with your bill of exceptions ; and I shall discharge

"your conditional order, with costs necessarily incurred, and no other. If you decline to give a satisfactory answer to my requisition, then my attendance before the Judge will be under protest, and I shall apply to the Court of Common Pleas, and seek to discharge your conditional order, with costs, unless you elect to abandon the bill of exceptions; and I require your answer to this notice in course of to-morrow," &c. The defendants replied, simply withdrawing the summons to settle the bill of exceptions for the present; but not signifying what other course they intended to adopt.

H. T. 1863.  
Common Pleas  
BLOOMFIELD  
v.  
JOHNSON.

*Macdonogh* (with whom was *J. Brooke* and *Dowse*) now moved accordingly.

The conditional order of the 8th of November was improvidently granted. If a party, on the trial of a cause, tenders a bill of exceptions, he cannot move for a new trial on a point which might have been included among the grounds of exception, unless the bill of exceptions be first abandoned: *Adams v. Andrews* (a); *Fabrigas v. Mostyn* (b); 2 *Ferguson's Rep.*, p. 1008; 2 *Chitty's Practice*, p. 272. The defendant should be put to his election.

*Brewster* and *J. Hamilton*, contra.

Until the bill of exceptions is signed, it is no part of the record.—[CHRISTIAN, J. The bill of exceptions is to be incorporated in the *postea*.]—The defendant could not safely elect until the settlement of the bill of exceptions: *Goddard v. Ingram* (c).—[KEOGH, J. But there the rule was only granted conditionally.—MONAHAN, C. J. That case shows that what we ought to have done when Mr. *Brooke* moved his motion, was, not to have granted this order at all, but to have extended the time for a fortnight, in order that, in that time, the defendant might make up his mind.]—The service of the notice in this case, to show cause against the conditional order, was a waiver of the irregularity: *Richardson v. Corcoran* (d); *Kilroy v. Midland Great Western Railway* (e).—[MONAHAN, C. J. It is one thing to move to set aside the order, as having been irregularly obtained, and another to show cause against the conditional order on the merits.]—The order cannot be treated as a nullity; and, if irregular, the irregularity may be waived. The notice of motion does not call on us to elect.

The Court, having intimated their opinion that the defendant should elect, allowed the motion to stand over for that purpose.

(a) 15 Q. B. 1001.

(b) 2 Wm. BL 929.

(c) 5 Jur. 1197.

(d) 7 Ir. Com. Law Rep. 121.

(e) 4 Ir. Com. Law Rep. 252.

H. T. 1863.      The defendant having resolved to abide by his bill of exceptions,  
*Common Pleas*  
 BLOOMFIELD      MONAHAN, C. J.  
 v.      We must discharge the conditional order, with costs, the defend-  
 JOHNSON.      ant electing to abide by the bill of exceptions.  
 Jan. 17.

*Macdonogh* having applied for the costs of showing cause against the conditional order, the Court took time to consider.

MONAHAN, C. J.

Jan. 19.      A notice has been served in this case, for the purpose of showing cause against the conditional order for a new trial in this action. When that motion came on, it occurred to myself and some other Members of the Court, that if the application were to set aside the conditional order, as improvidently granted by the Court, the course was to serve notice of motion to set aside the order, and not to show cause against the making absolute the order. We accordingly allowed the motion to stand; and a motion has been brought forward to set aside this order, as improvidently obtained, on the ground that a party had no right to obtain such an order, nor had the Court power to make such an order, while the bill of exceptions was pending, unless the party had elected to abandon the bill of exceptions. Looking into the cases, we agree with the argument that the Court made the order unadvisedly. Then, what the Court should have done, should have been to have refused to grant the order, unless the defendant abandoned the bill of exceptions, and they should have stayed their hand for a few days, until he made his election and had abandoned the exceptions. Then the question is, what ought to be done, the defendant not having abandoned the bill of exceptions when the order was obtained, and not having chosen to do so now? It follows that this conditional order must be discharged, the Court having acted improvidently, to say the least of it, in having granted the order. The question however is, what order we should make upon the motion for showing cause against the conditional order? With reference to this latter motion, we think that neither party is entitled to costs. We consider that, though the granting of the order was the act of the Court, it was his obvious course, when the plaintiff found that the Court unadvisedly made the order, and before the expense of further proceedings was incurred, to have done, in the first instance, what he has done now, namely, to move to discharge the conditional order. The rule which we shall make accordingly will be, to set aside the conditional order, with costs; and upon the motion to show cause we will make no rule, and neither party to have costs.

# INDEX.

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## ACCIDENT, INEVITABLE, DEFENCE TO ACTION FOR NEGLIGENCE.

*See* CARRIERS.

## ACTION, FORM OF.

*See* PROCEDURE ACT.

## ACTS OF SETTLEMENT.

*See* EVIDENCE.

## ADMINISTRATION.

*See* EXECUTOR DE SON TORT.

## ANCIENT MEADOW, AS BETWEEN LESSOR AND LESSEE.

Meadow land, which has not been broken up during the twenty years which immediately preceded the execution of a lease, is, as between lessor and lessee, *ancient* meadow, the breaking up of which during the term amounts to a breach of the lessee's covenant not to commit waste.

*So held* by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.—[LEFROY, C. J., and O'BRIEN, J.—HAYES, J., *dissentiente*. FITZGERALD, J., *absente*. Q. B. and Ex. Ch. *Murphy v. Daly* 239

## APPORTIONMENT OF RENT.

*See* LANDLORD AND TENANT, 2.

## "APPURTENANCES," CONSTRUCTION OF, IN A LEASE.

*See* TURBARY.

## ARREST FOR SUM UNDER £10.

A obtained a civil-bill decree against B, for £31. 3s. 6d., which was afterwards reduced by payment by instalments to £7. 3s. 6d. A, then arrested B, for the balance then remaining due. B afterwards sued A for a wrongful arrest, in respect of an amount not exceeding £10.—*Held*, that the 11 & 12 Vic., c. 28, s. 1, did not apply where the writ of execution originally issued for an amount, exclusive of costs, exceeding £10, though the amount to be actually enforced was subsequently reduced by payment below that sum; and that, accordingly, the present action was not maintainable.

*Held also*, that a civil-bill decree was in the nature of a writ of execution, as well as of a judgment.

*Shuldham v. Boles* (2 Ir. Com. Law Rep. 140) distinguished. C. P. *English v. Dunne* 562.

## ARREST OF DEBTOR.

*See* WRIT OF REVIVOR.

## 578 ARREST UNDER CA. SA.

### ARREST UNDER CA. SA., DISCHARGE FROM.

A debtor, arrested on a judgment, and discharged, cannot be arrested again upon foot of that judgment, or any portion thereof; notwithstanding that he may have obtained his discharge upon an undertaking to pay the amount of the judgment debt by instalments, and that that undertaking is embodied in an order of a Master of the Court of Chancery, which, while directing his discharge, declared that the judgment should stand as a security for the instalments. The violation of such an undertaking amounts to deception only, but not to fraud, so as to render the discharge void.

The proper modes of effectuating such an undertaking. *E. Seymour Clarke v.* 537

### "ARRIVE," MEANING OF THE WORD.

*See CONTRACT, 2.*

### ASSAULT, JUSTIFICATION OF.

To an action of assault and false imprisonment, the defendant pleaded that he was a Justice of the Peace for the county of K.; that F. M. made an information on oath, that he had lent a gun to P. L., who had afterwards neglected to return same, and that he had reason to believe that it was in the possession of the plaintiff, who was a pawnbroker at A.; that thereupon the defendant issued a warrant to the constabulary to search for the gun, and to arrest the party in whose possession it was found; that the police found the gun in the plaintiff's possession and arrested him, and brought him before the defendant and another Justice, who thereupon caused the plaintiff to enter into a recognizance to answer the charge at a subsequent Sessions, when an order was made for the restitution of the gun; and that the orders and

## BANKER'S DRAFT, &c.

warrant had not been quashed upon *certiorari*, and still remained in force.

*Held*, that so far as the defence proceeded on the Pawnbrokers Act (26 G. 3, c. 43, s. 13), the act of the defendant could not be justified, inasmuch as it neither appeared that the gun had been unlawfully pawned, nor was there any charge of felony alleged in the information; and that the defendant had to that extent acted without any jurisdiction; but that regarding the warrant as one for procuring the attendance of the plaintiff at the Petty Sessions, the subsequent orders had been made in the same matter, and that the defendant had not acted wholly without jurisdiction; and that until the orders had been quashed pursuant to the 12 *Vic.*, c. 16, s. 2, no action in respect of what was done under the warrant was maintainable against the defendant. *C. P. McDonald v. Bulwer* 549

### AWARD.

*See REFERENCE AT TRIAL.*

The Common Law Procedure Amendment Act (Ireland) 1856, s. 11, gives the Court jurisdiction to remit, at *any* time, an award to the arbitrator, in order that he may correct a superficial error.

This jurisdiction cannot be ousted by inserting a prohibitory clause in the consent.

*Semble*—That the Court will, in every case, limit a time within which the amendment must be made. *Q. B. Coleman v. The Cork and Youghal Railway Co.* 368

### BANKER'S DRAFT PAYABLE TO ORDER ON DEMAND.

A summons and plaint alleged that A, the plaintiff, drew a cheque upon a banking company, requiring them to pay to S. and K., or their order £190. 17s. 7d., the bank having at the time the funds of A to meet

## BAIL.

same; that P. L. forged the signature of S. and K. as an endorsement on the back of said cheque, and presented same for payment to the bank; that said forged document was manifestly not in the handwriting of S. and K., or either of them, and was manifestly in the handwriting of P. L.; and that the respective handwritings of S. and K. and P. L. were well known to the servants and agents of the bank at their office when the same was presented for payment by P. L.; that the bank wrongfully cashed the cheque, and paid money of the plaintiff, to the amount of £190. 17s. 7d., to P. L.; and said money was so paid to P. L. by the gross negligence of the bank, &c. &c.—*Held* [CHRISTIAN, J., *dissentiente*], that the allegations in the plaint showed that the instrument in question was a draft for money payable to order, within the 16 & 17 Vic., c. 59, s. 19, and that it purported to have been endorsed by S. and K., and accordingly the bank was protected by statute, and the action was not maintainable. C. P. *Hare v. Copland* 426

## BAIL.

See SUMMARY CONVICTION.

## BILL OF EXCHANGE.

See PRINCIPAL AND SURETY.

To an action by endorsee against acceptor of a bill of exchange, the defendant pleaded thirdly, that before the obtaining or acceptance of said bill, the plaintiff agreed to sell an estate to J. S., the drawer of said bill, and that a portion of the purchase-money of said estate should be secured by a bill to be accepted by the T. Bank (whose official manager the defendant was), and the balance by a mortgage on part of the estate; that the plaintiff, at the expense of J. S., should do all necessary acts, and execute all proper transfer deeds, &c. That subsequently it was agreed between the

## BILL OF EXCHANGE. 579

plaintiff and J. S. that the amount for which the bill was to be drawn should be increased, so as to include a further sum alleged to be due by J. S. to the plaintiff; and accordingly J. S. delivered to the plaintiff a bill of exchange, drawn by him upon and accepted by the bank for £17,000, payable the 1st of December 1855, which the bank accepted for the accommodation of J. S., and never received any consideration for the acceptance or payment of the same; which bill was afterwards renewed by the bank, by the bill now sued on, for which they had never received any value or consideration, nor, except as aforesaid, there never was any value or consideration for the endorsement of said bill to the plaintiff; and that after the bill became due, and before the commencement of the suit, the plaintiff repudiated the said agreement, and refused to convey the estate and to perform the agreement.

The fourth defence averred, in addition, that J. S., after making the said agreement, conveyed his interest in said estate to trustees; that the plaintiff afterwards filed a bill in the Court of Chancery in England against the present defendant, amongst others, as representing the bank, praying that the said agreement should be cancelled as fraudulent, &c.; that the defendant appeared on the part of the bank, and disclaimed any interest in the subject-matter of the suit; and that he was thereby induced, as such official manager, to change, and did change, the position of the banking company, whereby the plaintiff was estopped from setting up the validity of the agreement, or to recover the amount of said bill.

The plaintiff replied to the fourth defence, that the bill in Chancery was afterwards dismissed by Side-bar order. The plaintiff likewise demurred to both pleas, and the defendant demurred to the replication.

*Held*, that the third defence was

no answer to the action, inasmuch as the making of the contract, and not its performance, was the consideration for the bill.

*Held also*, that the fourth plea was likewise no answer to the action, inasmuch as it did not follow that the defendant was necessarily induced by the plaintiff's suit in Equity to disclaim the benefit of the agreement, and thereby to alter his position.

*Held also*, that even assuming this to have been the case, the replication, by showing that the suit had been dismissed for want of prosecution, was a sufficient answer to the defence. *C. P. Eyre v. M'Dowell* 458

#### BOG.

*See* TRESPASS TO REAL PROPERTY.  
TURBARY.

#### BREACH OF COVENANT.

*See* RIGHT OF ENTRY.

#### CA. SA.

*See* ARREST UNDER CA. SA.

#### CARRIERS.

Although a carrier of passengers does not warrant their safety, or their due arrival at their destination, yet he warrants that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects of construction, and roadworthy, as far as human care and foresight can provide.

A railway company, who purchased their rolling stock from competent manufacturers in the due course of business, are responsible for the negligence of those manufacturers in the construction of that stock, to the same extent as they would be in case they were themselves the manufacturers.

A defence by a railway company, relying upon an inevitable accident, must state all the facts which they

#### CONTRACT.

contend constitutes such inevitable accident. *E. Burns v. The Cork and Bandon Railway Co.* 543

#### CERTIFICATE FOR COSTS, APPLICATION FOR.

*See* REFERENCE AT TRIAL.

#### CIVIL-BILL DECREE.

*See* ARREST FOR SUM UNDER £10.

#### CONDITION.

*See* CONTRACT, 2.

#### CONFLICT BETWEEN REGISTRY ACTS.

*See* SHERIFFS' DEED.

#### CONSIDERATION, PARTIAL FAILURE OF.

*See* BILL OF EXCHANGE.

#### CONSTRUCTION OF "APPURTENANCES," IN A LEASE.

*See* TURBARY.

#### CONSTRUCTION OF "RIGHTS OF WAY."

*See* RELEASE.

#### CONSTRUCTION OF 52 G. 3, c. 134.

*See* WEIGHMASTER.

#### CONSTRUCTION, RULES OF, IN WILL.

*See* DEVISE.  
WILL.

#### CONSTRUCTIVE DELIVERY.

The *Judge*, at the trial, is to decide whether the evidence of a constructive delivery of goods bargained and sold is sufficient to satisfy the Statute of Frauds. *Q. B. Kealy v. Tenant* 394

#### CONTRACT.

1. To an action for the price of barley

## CONTRACT.

sold and delivered, the defendant pleaded that the barley delivered was inferior to the sample, and that the defendant used a small portion in making malt, which turned out bad and useless, whereupon defendant requested plaintiff to take back the barley, which he refused. He further pleaded that the barley was warranted to be fit for malting; that the barley delivered was unfit for that purpose, and that he used a small portion of the barley in making malt, and that the malt made therefrom was of no value; alleging a refusal by the plaintiff to take back the remainder of the barley, which with the malt so made remained still on defendant's premises, and was of no use.—*Held*, that the pleas were bad, for not showing that the defendant made the trial of quality within a reasonable time after delivery, and that he used only so much of the barley as was sufficient for the trial. C. P. *Coventry v. McEniry* 160

2. A cargo of Indian corn was shipped at New York, on a vessel named the "The Surf," bound for Sligo. A written contract was made between the plaintiff and the defendants, for the sale and purchase of the cargo; and one of the terms was that, if the "Surf" did not "arrive" on or before the 20th of June, the contract should be void. The "Surf" arrived prior to the 20th of June, at a place called "Oyster Island," about four miles from Sligo, and within the natural port and harbour of Sligo. It appeared that vessels anchoring at Oyster Island report themselves to the custom-house of Sligo, and become liable to port and harbour dues. The "Surf" did not arrive at the quay of Sligo until after the 20th. The defendant having at the trial relied upon the breach of condition, the LORD CHIEF JUSTICE ruled that the term "arrive," in the condition, meant "at the quay of Sligo;" and he accordingly directed a verdict for the defendants. The facts having been stated in special case for the

## DEMURRER.

581

opinion of the Court—*Held* (*per* KEOGH and CHRISTIAN, JJ., MONAHAN, C. J., *dissentiente*), that the question of arrival was one of fact, and should have gone to the jury.

*Held, per* MONAHAN, C. J., that the question entirely turned upon the meaning of the word "arrive" in the contract, and was one of law, to be determined by the Court. C. P. *Montgomery v. Middleton* 173

## CONVEYANCE FROM EXECUTION DEBTOR.

*See* SHERIFFS' DEED.

### COSTS.

*See* PRACTICE, 3.  
REFERENCE AT TRIAL.

### COUNSEL.

*See* PRACTICE, 3.

### DAMAGES.

*See* EXECUTOR DE SON TORT.

### DEBTOR, ARREST OF.

*See* WRIT OF REVIVOR.

### DEFENCE.

*See* ASSAULT.  
CARRIERS.

### DEFENCE, EQUITABLE.

*See* PRINCIPAL AND SURETY.  
TRESPASS TO REAL PROPERTY, 1.

## DEMURRER.

*See* ASSAULT, JUSTIFICATION OF.  
BILL OF EXCHANGE.  
CONTRACT, 1.  
HUSBAND AND WIFE.  
LANDLORD AND TENANT, 2.  
PRACTICE, 2.  
PRINCIPAL AND SURETY.  
SLANDER.  
TRESPASS TO REAL PROPERTY.



**DEVIATION FROM FORM OF  
OATH PRESCRIBED BY  
A STATUTE.**

*See* **WEIGHMASTER, DISTURBANCE  
OF OFFICE OF.**

**DEVISE.**

A devise of a "house, garden, out-offices, lawn to monks named 'Christian Brothers'"—*Held*, void for uncertainty. *C. P. Hogan v. Byrne*  
166

**DEVISE, CONSTRUCTION OF.**

*See* **WILL.**

**DISCLAIMER.**

*See* **BILL OF EXCHANGE.**

**DISTRIBUTION, BOOKS OF.**

*See* **EVIDENCE.**

**DISTURBANCE OF OFFICE OF  
WEIGHMASTER, WHAT  
AMOUNTS TO.**

*See* **WEIGHMASTER.**

**DOCUMENTS ON ARGUMENT,  
PRODUCTION OF.**

Where a party in pleading sets out partially, and relies on, a document not under seal, the Court may, under sections 63 & 64 of the Common Law Procedure Act (1853), treat such document as if set out in pleading *in extenso*, and give judgment upon it accordingly.—[*FITZGERALD, B., dissentiente.*]

*Per* *FITZGERALD, B.*—This rule only applies to documents of which *oyer* was demandable before the Common Law Procedure Act.

An order of Justices, authorising a road contractor to enter the lands of a third party, and take stones, under the 162nd section of 6 & 7 *W. 4*, c. 116, was in the following terms:—"Under the provisions of the Grand Jury Acts, 6 & 7 *W. 4*,

**EVIDENCE.**

c. 116, s. 162, I hereby authorise and empower *M. O'B.*, road contractor, to enter on the lands of *S.*, in the possession of *E. F.*, for the purpose of quarrying and carrying away materials for the repair and maintenance of 400 perches of the road from *Ne-nagh* to *Limerick*, between the barony bounds at *T.*, and the barony bounds at *D.*, in the barony of *Upper Ormond* and county of *Tipperary*; and we name *J. Q.*, *M. O'B.* and *M. S.* arbitrators as to damage.

"Given under my hand, at *Ne-nagh Petty Sessions*, this 14th day of *July 1860*.

"*R. G.* } Justices of the Peace  
"*W. O.* } County *Tipperary.*"

*Held*, that this order was bad, no jurisdiction of the Justices to make it appearing upon the face of the order. *E. Fitzpatrick v. Pine* 32

**EJECTMENT ON TITLE.**

*See* **MAINTENANCE.**

**EQUITABLE DEFENCE.**

*See* **PRINCIPAL AND SURETY.  
TRESPASS.**

**ERROR FROM THE COURT OF  
EXCHEQUER.**

*See* **PLEA, CONSTRUCTION OF.**

**ESTOPPEL.**

*See* **BILL OF EXCHANGE.**

**EVICITION.**

*See* **LANDLORD AND TENANT, 2.**

**EVIDENCE.**

*See* **CONTRACT, 2.  
MARSHALSEA, FOUR-COURTS.  
MEDICAL ACT.  
PUBLIC OFFICER.**

Extracts from the Books of Distribution are admissible in evidence, in questions arising upon the quantities and

## EXECUTION.

descriptions of land granted by patents, made under the Acts of Settlement and Explanation.

*Knox v. The Earl of Mayo* (7 Ir. Chan. Rep. 563) affirmed. *E. Spaight v. Twiss* 516

## EXECUTION.

*See* ARREST FOR SUM UNDER £10.

ARREST UNDER CA. SA.,  
DISCHARGE FROM.

## EXECUTOR DE SON TORT.

In an action of trover by an administratrix against A, who had made himself executor *de son tort*, evidence was received, in mitigation of the damages against A, of payments made by him, which would have been allowed in a due course of administration by a rightful executor. *Held*, that such evidence was properly received. C. P. *McCarthy v. Donovan* 195

## EXCHANGE, BILL OF.

*See* BILL OF EXCHANGE.  
PRINCIPAL AND SURETY.

## FALSE IMPRISONMENT.

*See* ASSAULT, JUSTIFICATION OF.

## FORFEITURE.

*See* RIGHT OF ENTRY.

## FRAUDS, STATUTE OF.

*See* CONSTRUCTIVE DELIVERY.

## HUSBAND AND WIFE, ACTION BY.

In an action by A, jointly with B his wife, to recover from D a sum of £22, "money received by the defendant for the use of the plaintiffs," the defendant demurred, upon the ground, amongst others, that it did not appear whether A was suing in his own right or in the right of his wife.—*Held*, that it ought to have

## LANDLORD & TENANT. 583

appeared from the summons and plaint in what interest B had been joined as co-plaintiff with A; and that, notwithstanding the Common Law Procedure Act 1853, secs. 84–7, the misjoinder was the subject-matter of a demurrer. C. P. *Cahill v. McDowall* 481

## INCONTINENCE.

*See* SLANDER, 1.

## JUDGMENT.

*See* ARREST UNDER CA. SA.

## JUDGMENTS, SUMMARY OF.

*See* PRACTICE, 1.

## JUSTICE OF PEACE.

*See* ASSAULT.

In an action against a Justice, for acts done by him in the execution of his office, the defendant cannot, at the trial, avail himself of the provisions of the Protection of Justices Act (11 & 12 Vic., c. 16), requiring the service of a notice of action, unless the want of such notice has been relied upon in pleading.—(LEFROY, C. J., *dissentiente*.) Exch. Ch. *Lawrenson v. Hill* 1

## JURISDICTION OF COURT TO REMIT AWARD.

*See* AWARD.

## JUSTIFICATION, PLEA OF.

*See* ASSAULT.

## LANDED ESTATES COURT, PURCHASER UNDER.

*See* RIGHT OF ENTRY.

## LANDLORD AND TENANT.

1. A and B, by lease, dated the 13th of January 1831, reciting that A had

mortgaged to B the premises included in the lease, demised certain premises to C. The rent was reserved to A, the mortgagor, and also the powers of distress and re-entry. A and B, in the year 1836, assigned their interest to D, who brought ejectment for non-payment of rent.—*Held*, that C was not estopped from disputing the title of A.

*Held also*, that, independently of the Landlord and Tenant Law Amendment Act, D could not maintain ejectment for non-payment of rent.

*Held also*, per FITZGERALD, HUGHES and DEASY, BB., that the relation of landlord and tenant, within the meaning of the 3rd section of the Landlord and Tenant Law Amendment Act (23 & 24 Vic., c. 154), did not subsist between D and C.

*Per* FROST, C. B.—The 3rd section of that statute is not retrospective. *E. M'Areavy v. Hannan* 70

2. To an action against an assignee for several gales of rent, due on a lease made before the passing of the Landlord and Tenant Law Amendment Act 1860 (23 & 24 Vic., c. 154), and some of which gales accrued before, and some after, the Act, the defendant pleaded that, during all the time he was assignee, the plaintiff and his under-tenants were in actual possession and occupation, and in the receipt of the rents and profits of a portion of the premises against his will, whereby the defendant was deprived of the rents and profits of same. The plaintiff replied, setting out the several times when the rent accrued.

*Held*, on demurrer, that the plea was an answer to so much of the action as claimed the rents which accrued due prior to the passing of the Act; but that, with respect to the gales which accrued subsequently, the

## LEGACY DUTY, &amp;c.

plea was bad, and that the plaintiff had a right, under section 44, to recover a proportion of each of the latter gales.

*Held also*, that the 44th section operates upon contracts of tenancy made prior to, and in force at, the time of the passing of the Act, but only as to future breaches of same. *C. P. Mercer v. O'Reilly* 153

## LANDLORD AND TENANT LAW AMENDMENT ACT.

*See* LANDLORD AND TENANT, 1, 2.

## LEASE BY MORTGAGOR AND MORTGAGEE.

*See* LANDLORD AND TENANT, 1.

## LEGACY DUTY, EXEMPTION FROM.

A bequest of personalty in a will, so given as, by analogy to the statute 43 Eliz., c. 4 (*Eng.*), to be a valid charitable bequest, is a legacy for a "purpose merely charitable," within the meaning of the 38th section of the 5 & 6 Vic., c. 82, and is exempt from legacy duty.

A testator directed a sum of £2000 to be disposed of by his executors to such charitable purposes, or for the promotion of art and industry in Ireland, in such manner and portion as his executors should, in their discretion, think most advisable. This having been held, in a suit to administer the testator's assets, a valid charitable bequest, a scheme was settled, by which the executors applied the fund for the establishment of a perpetual endowment for the encouragement of students of the Fine Arts in Ireland.

*Held*, that this was a legacy for a "purpose merely charitable," within the 38th section of the 5 & 6 Vic., c. 82. *E. Attorney-General v. Bagot* 48

## LIABILITY OF SURETY.

## LIABILITY OF SURETY.

See LOAN-FUND ACT.

## LIBERUM TENEMENTUM, PLEA OF.

See TRESPASS TO REAL PRO-  
PERTY, 2.

## LOAN-FUND ACT.

Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of the debtor, will not discharge the surety, and is no ground of equitable defence.

Independently of the general principles of law, a surety under the provisions of the 6 & 7 *Vic.*, c. 91 (the Loan-fund Act) is precluded from raising this defence. Q. B. *Madden v. Mullen* 305

## MAINTENANCE.

A brought an ejectment on the title, for the recovery of certain premises, which he claimed under a conveyance from B, who was the grantee of C, who had, at the time of the grant, been out of the actual possession of, and of the receipt of, the rents and profits of the premises for several years, and which possession the plaintiff sought to obtain by the present action.—*Held*, that the 10 *Car.* 1, sess. 3, c. 15 (*Ir.*), against maintenance, &c., and the unlawful buying of titles, was still in force, and was not repealed or affected by the 8 and 9 *Vic.*, c. 106, s. 6. which applied exclusively to England; and consequently that the deed under which A claimed was void.

*Semble*, that the latter enactment was not intended to apply to transfers of disputed rights of entry. C. P. *Nelson v. Small* 558

## MARRIAGE BETWEEN BRITISH SUBJECTS.

A marriage between British subjects, at the celebration of which no or-

## MEDICAL OFFICER, &c. 585

dained clergyman of the Established Church of England and Ireland intervened, is not valid at Common Law so as to avoid a marriage subsequently solemnized in due form, between one of the parties to the first marriage and a third party, and bastardize its issue. Q. B. *Du Moulin v. Druitt* 212

## MARSHALSEA, FOUR-COURTS.

The power of making and altering the rules and regulations of the Four-courts Marshalsea, and of every prison in Ireland, was transferred by the 19 & 20 *Vic.*, c. 68, s. 3, from the Court of Queen's Bench to the Lord Lieutenant. The powers of inspection and punishment given to the Marshal by the thirtieth of the rules of 1857, for the regulation of the Four-Courts Marshalsea, may be exercised by the Local Inspector, under the thirty-seventh of those rules, when the Marshal is present in the prison, as well as when he is absent, or ill.

*Semble*—That the Deputy Marshal can exercise the powers of the Marshal only during the illness or absence of the latter. E. *Carpenter v. Teeling* 525

## MEDICAL ACT.

When the Registrar of the Branch Medical Council inserts in, and afterwards, by order of such Branch Council, and without notice to the party registered, strikes out of the register the description of a qualification which the evidence produced to the Registrar by the claimant did not show that he had obtained, the Court will not by mandamus compel the Registrar to re-insert such description. Q. B. *The Queen v. Steele* 398

## MEDICAL OFFICER TO POOR- LAW UNION.

See SLANDER, 2.

MEANING OF THE WORD  
"ARRIVE."*See* CONTRACT, 2.

## MISDIRECTION.

*See* CONSTRUCTIVE DELIVERY.  
CONTRACT, 2.

## MISJOINDER.

*See* HUSBAND AND WIFE.

## MISREPRESENTATION.

*See* PRINCIPAL AND SURETY.MONKS, RELIGIOUS ORDER  
OF.*See* DEVISE.

## NEGLIGENCE.

*See* CARRIERS.  
LOAN-FUND ACT.NOTICE OF ACTION, WHETHER  
WANT OF, SHOULD BE  
PLEADED BY DEFENDANT.*See* JUSTICE OF PEACE.

## ORAL SLANDER.

*See* SLANDER.PARTIAL FAILURE OF  
CONSIDERATION.*See* BILL OF EXCHANGE.

## PAWNBROKERS ACT.

*See* ASSAULT, JUSTIFICATION OF."PLACE OF EXPORT,"  
MEANING OF PHRASE, WITHIN  
THE BUTTER ACTS.*See* PUBLIC OFFICE, EVIDENCE OF  
TITLE TO.

## PLEA, CONSTRUCTION OF.

To an action for wrongfully keeping and maintaining a weir at a height beyond its ordinary level, whereby plaintiff's lands were flooded, the defendant pleaded that he "did not wrongfully keep and maintain the weir at a height greater than its ordinary level." The issue followed the words of the defence.—*Held*, affirming a judgment of the Court of Exchequer, that the plea only put in issue the fact of the maintenance of the weir, and that evidence, on behalf of the defendant, that such maintenance was rightful, was inadmissible. *Exch. Ch. Keller v. Blood* 19

## PLEADING.

*See* CARRIERS.  
CONTRACT, 1.  
HUSBAND AND WIFE.  
WRIT OF REVIVOR.

## PLEA OF LIBERUM TENEMENTUM.

*See* TRESPASS TO REAL PROPERTY, 2.

## PRACTICE.

1. Where, at the trial, there is a verdict for the defendant on several of the issues joined, and a verdict for the plaintiff, with damages, on another issue, a summary of the judgment which omits the judgment for the defendant on the issues found for him is irregular, and will be amended. *E. Moohan v. Bloomfield* 86
2. Where, in an action of covenant upon a deed, the defendant, who had the deed in his custody, pleaded by referring to the deed, making *profert* of it, and then demurred to the summons and plaint, on the ground that the deed contained no such covenant as that sued upon, the Court set aside the demurrer as irregular. *E. Maher v. Purcell* 133
3. A retainer, on behalf of the defendant, was left at the Dublin residence

of a Q. C., then absent in London, attending Parliament. The cause being in the special jury list of causes for trial on Monday June 23rd, the plaintiff's attorney, not knowing of the defendant's retainer, sent a brief to London to the Q. C., who, in ignorance of the previous retainer, sent a reply that he would be in Court on the following Wednesday morning. The cause was unexpectedly called on Monday; and a postponement having being refused, was proceeded with, and concluded the following day. Counsel did not arrive until after its termination on Tuesday; and he was in Court the following morning; and subsequently returned the defendant's retaining fee. Plaintiff having obtained a verdict, the Taxing-officer allowed the above brief and fee on taxation against the defendant.

*Held*, on a motion to review taxation, that these items had been properly allowed, inasmuch as at the time of the delivery of the brief there was a *bona fide* intention on the part of the plaintiff's attorney that the Q. C., should attend the trial on behalf of the plaintiff, and a reasonable probability of his being able to do so; and that the fact of his not having attended did not alter the case.

*Held also*, that this Court had no jurisdiction to interfere between Counsel and their clients in a question of retainer, which must be settled by the Counsel themselves, guided by the opinion of the leading Members of the Bar. C. P. *Taylor v. Clarke* 571

#### PRINCIPAL AND SURETY.

To an action for £300. 12s. 4d., the amount of two promissory notes, the defendant pleaded (by way of defence on equitable grounds) that he had accepted a bill of exchange for the accommodation of A, and that A afterwards endorsed the same to the plaintiff, with notice that it had been

accepted by the defendant as a surety only, and for the sole accommodation of A; and that the plaintiff, without the knowledge and consent of the defendant, and for good and valuable consideration, gave to A time for the payment of said bill of exchange, beyond the time when same was due and payable; that, after the time for payment was so given, the defendant, upon the representation of the plaintiff's attorney that he was still liable for said bill, deposited certain title-deeds as security for the payments thereof, and that afterwards, for the purpose of obtaining possession of the said title-deeds, he made and gave to the plaintiff the promissory notes in the summons and plaint mentioned; and that, save as aforesaid, there never was any consideration for the deposit of the said title-deeds, or for the making of the said notes.—*Held*, upon demurrer, that this was a good equitable defence. C. P. *Bristow v. Brown* 201

#### PRISON REGULATIONS.

*See* MARSHALSEA, FOUR-COURTS.

#### PRIVILEGED COMMUNICATION IN DISCHARGE OF DUTY.

*See* SLANDER.

#### PROCEDURE AMENDMENT ACT (1853).

*See* DOCUMENTS ON ARGUMENT,  
PRODUCTION OF.  
PRACTICE, 2.  
REFERENCE AT TRIAL.

The Common Law Procedure Amendment Act (*Ir.*) 1853, s. 3, repealed the 6 *Anne*, c. 10 (*Ir.*), s. 23, only so far as to destroy the *form* of action thereby created; but left the right of action unimpaired. Q. B. *Kearney v. Kearney* 314

#### PRODUCTION OF DOCUMENTS.

*See* DOCUMENTS, PRODUCTION OF.

## 588 PROHIBITORY WORDS.

### PROHIBITORY WORDS.

*See* AWARD.

### PUBLIC OFFICE, EVIDENCE OF TITLE TO.

Evidence of acting in a public office is evidence to go to the jury of a title to that office, as against a wrong-doer, though the title be put in issue by the pleadings, and the appointment is required to be under seal. And such evidence of acting carries with it the presumption that all formalities necessary to authorise such acting have been complied with.

An inland town, from the market of which butter is sent direct to a foreign market, is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61.

An allegation in this Court, that the verdict at the trial was upon the whole unsatisfactory, and that a new trial ought to be granted, is not a ground for disturbing the judgment of the Court below. Exch. Ch. *Hayes v. Dexter* 22

### PUBLIC ROAD, OBLIGATION ON A RAILWAY COMPANY TO REPAIR.

A railway company, in constructing their line of railway across a public road, lowered a portion of the surface of the road, in order to give the railway bridge the legal height, and to have the proper ascent and descent on the road. The portion so lowered was not used by the company, but, having become worn by the public traffic, it was sought to make the company liable, under the 46th section of the 8 Vic., c. 20, for its repairs.—*Held*, that there was no obligation on the company to keep in repair the portion of the road in question, not being an approach to the bridge, within the meaning of that section. *C. P. Fosberry v. Waterford and Limerick Railway Co.* 494

## REFERENCE AT TRIAL.

### PURCHASER UNDER LANDED ESTATES COURT.

*See* RIGHT OF ENTRY.

### "PURPORT," MEANING OF WORD.

*See* BANKER'S DRAFT, PAYABLE TO ORDER ON DEMAND.

### "PURPOSE MERELY CHARITABLE," WHAT IS.

*See* LEGACY DUTY, EXEMPTION FROM.

### RAILWAY COMPANY.

*See* PUBLIC ROAD, OBLIGATION ON RAILWAY COMPANY TO REPAIR.

### RAILWAY COMPANY, LIABILITY OF.

*See* CARRIERS.

### REASONABLE TIME FOR TRIAL OF QUALITY.

*See* CONTRACT, 1.

## REFERENCE AT TRIAL.

An action was brought for the breaking of a dam, and thereby causing an unusual quantity of water to flow to the plaintiff's mill, so as to obstruct the working.

The second count charged the defendant with having deepened the channel of a certain stream, and having caused same to flow in an unusual direction, so as to damage the plaintiff's premises. The defendant pleaded to both counts, by way both of denial and justification.

The case was referred, at the trial, to arbitrators, whose award was to be entered as the verdict of the jury, and they ultimately found for defendant on the first count, and for plaintiff on the second count.—*Held*, upon a motion for a certificate, under the 97th section of the Common Law Proce-

## REGISTRATION, &c.

dure Amendment Act 1856, that the case was fit to be tried in one of the Superior Courts, notwithstanding that the parties resided within the same jurisdiction, that in consequence of the reference, the Court had jurisdiction to grant the certificate at this stage of the cause, and that it was a proper case for so doing. C. P. *Bennett v. Scott* 467

## REGISTRATION OF MEDICAL QUALIFICATION.

*See* MEDICAL ACT.

## REGISTRY ACTS, CONFLICT BETWEEN.

*See* SHERIFF'S DEED.

## RELEASE.

Three grantors, and each of them, by deed, granted, &c., released, &c., to the plaintiff, three several plots of ground, "with all and singular . . . ways, paths, and passages."—*Held*, that the release in the deed was a release by each grantor of his rights of way over the plots conveyed by his co-grantors. Q. B. *Burke v. Blake* 390

## RENT, REDUCTION OF BY COURT OF CHANCERY.

A lessee subdemised lands at the clear yearly rent of £214. 8s. 4d., which the Court of Chancery, in a subsequent suit, reduced to £142. 6s. 9½d. "until further order." Afterwards, the Commissioners of the Incumbered Estates Court sold the fee-simple of the lands discharged of the head lease, and conveyed them to the purchaser, subject to the sub-lease "made to, &c., at the yearly rent of £142. 6s. 9½d., payable," &c. The Court was divided in opinion on the question, whether the purchaser was entitled to the yearly rent of £214. 8s. 4d., or the abated rent only. Q. B. *Rockfort v. Ennis* 324

## SHERIFF'S DEED. 589

### RELIEF ACT, ROMAN CATHOLIC.

*See* DEVISE.

## RELIGIOUS ORDER OF MONKS.

*See* DEVISE.

## RETAINER.

*See* PRACTICE, 3.

## RIGHT OF ENTRY.

*See* MAINTENANCE.

Where a right of entry for breach of covenant, in a lease for lives renewable for ever, accrued to the reversioner, prior to the sale of his interest in the Landed Estates Court—*Held*, that such right of entry did not pass to the purchaser of the reversion under the conveyance of the lands from the Landed Estates Court, and that ejectment for the forfeiture could not be maintained.

The conveyance from the Landed Estates Court granted the lands "subject to the lease."

*Per* PIGOT, C. B.—The saving of the lease in the conveyance amounted to a stipulation binding on the purchaser, that the lease was, at the date of the conveyance, a subsisting interest for lives renewable for ever. E. *Bergin v. Warburton* 137

## "RIGHTS OF WAY," CONSTRUCTION OF.

*See* RELEASE.

## ROMAN CATHOLIC RELIEF ACT.

*See* DEVISE.

## SALE OF GOODS.

*See* CONTRACT, 1.

## SHERIFF'S DEED.

A Sheriff, under a writ of *fiery facias*, seized, on the 16th of July 1860, the



interest of the execution debtor in a term of years; and, having sold to the plaintiff in ejectment, on the 31st of July, executed to him the usual conveyance of the debtor's interest on the 20th of August.

The debtor, on the 30th of July, after the seizure, conveyed the term to the defendant. This deed was registered on 2nd of August. The plaintiff's deed was unregistered.

*Held*, that the conveyance of the 30th of July acquired no priority by registry.

Where the conflict is between two deeds, of which that one alleged to be postponed only by reason of the registry of the other, and which, but for that registry, must have priority, is not capable of being registered, so as to maintain its priority, the registration of the other deed will not give that other deed priority. *E. O'Connor v. Stephens* 63

### SLANDER.

1. The summons and plaint in an action for oral slander alleged that the defendant spoke and published of the plaintiff, whose employment was that of a female domestic servant, the following words, in relation to her employment—"I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge!" No special damage was alleged—

*Held*, that the words were actionable *per se*, as relating to the plaintiff's employment. *C. P. Connors v. Justice* 451

2. In action for oral slander, the plaintiff complained that he carried on the business of wine merchant at Naas, and had, in that capacity, furnished to the poor-law guardians of the union of Naas a proposal to supply to them wine of a certain quality, as per sample, and at a certain price,

and that, at the time the proposal and sample were under the consideration of the guardians, the defendant spoke and published of him, and of him in his trade and business of a wine merchant, these words—"No matter what price is given for wine in Naas, it will be South African sherry." [Meaning that if the proposal of the plaintiff for the supply of wine to the guardians should be accepted, he would, in performance of his part of the contract, supply a wine different from the sample, and of worse quality and price than as shown]. The defendant pleaded, in addition to other pleas, that, before and at the time of the speaking of the words, he was a paid medical officer of the poor-law union of Naas, and, as such, it was part of his duty to see that the wines and spirits provided by the guardians for the use of the hospital should be good and proper for that purpose; and that it was also part of his duty to report to the guardians the probable quantities which would be likely to be required and used by him, and to express to the guardians the views and opinions of the suitability of the several qualities and descriptions of wines provided, or to be provided, for such purposes, as well as to inform the guardians if any of the wines and spirits so provided by them for such purpose were bad or unsuitable in quality, or otherwise; and the defendant averred that, before the speaking of the words, proposals for the supplying of the workhouse with wine and spirits had been advertised for in the public newspapers; and that the plaintiff had sent in a proposal for the supplying of wine; and that, at the time of the speaking of the words, the proposals were under the consideration of the guardians, and that the defendant, as such medical officer, and in the discharge of his duty, attended, and that he spoke the words *bona fide* and honestly in the discharge of his duty, and without malice, and that, at the time he so spoke and published the words,

## STATUTES QUOTED.

he believed them to be perfectly true in substance and in fact.—*Held*, on demurrer, to be a good plea of privilege, inasmuch as it set forth an occasion which warranted the interference of the defendant, and contained averments that he acted without malice, and that he spoke the words believing them to be true. C. P. *Murphy v. Kellet* 488

## STATUTES QUOTED.

- 1 *Car.* 1, sess. 3, c. 15 (*Ir.*)
- 26 *G.* 3, c. 43, s. 13.
- 35 *G.* 3, c. 30 (*Ir.*)
- 52 *G.* 3, c. 134.
- 10 *G.* 4, c. 7.
- 6 & 7 *W.* 4, c. 116, s. 162.
- 6 *Anne* (*Ir.*), c. 10, s. 23.
- 5 & 6 *Vic.*, c. 82, s. 38.
- 8 *Vic.*, c. 20.
- 11 & 12 *Vic.*, c. 23, s. 1.
- 16 & 17 *Vic.*, c. 59, s. 19.
- 19 & 20 *Vic.*, c. 68, s. 3.

## SUMMARY CONVICTION BY JUSTICES, OUT OF PETTY SESSIONS.

Summary conviction (made by two Justices out of *Petty Sessions*) quashed, because it did not appear on the return to a writ of *certiorari*, to remove the conviction, &c., that the now prosecutor (the defendant in the Court below) was *in fact* unable to give bail for his appearance at *Petty Sessions*.

*Semble*—That it is the duty of two Justices, acting out of *Petty Sessions*, to take the initiative, and require the defendant to give bail.

*Semble*—That, on the argument on the return to a writ of *certiorari*, reference cannot be made to the affidavits used on the motion to make absolute the conditional order for the writ.

*Quære*—Is an order or conviction, though drawn in exact conformity with the form sanctioned by the Lord Lieutenant in Council, pursuant to the

## TRESPASS.

591

statute, legal, if it does not state the fact which gave jurisdiction to the Justices? Q. B. *The Queen v. The Justices of Peace for the County of Dublin* 375

## SUMMARY OF JUDGMENTS, FORM OF.

See PRACTICE, 1.

## TAXATION.

See PRACTICE, 3.

## TRESPASS TO REAL PROPERTY.

1. To a summons and plaint, containing counts in trespass and trover, for cutting turf upon a bog granted to the defendants by a deed, which reserved the "turbary" to the plaintiffs, an equitable defence was pleaded to this effect: that the very questions raised in this action had been the subject of a bill and cross-bill filed by the ancestors of the parties to this action; the former to establish an exclusive right to turbary in the ancestor of the plaintiff, under an instrument in writing of the year 1791, the latter praying the execution of a conveyance to the ancestors of the defendants in the terms of the above mentioned instrument; that the ancestor of the plaintiff, having brought an action of ejectment for the bog in question, pursuant to decretal order of the Court of Chancery, a verdict was found for the ancestors of the defendants, which the Court, sitting *in banco*, refused to set aside; that in a second action, brought by the ancestor of the plaintiff, for preventing him from cutting turf on the bog, he was nonsuited; that the cross-suits having come to a hearing, a decree was pronounced, which remains in minutes "as the parties thereto agreed, and did act on the minutes, and submitted thereto;" that by that decree the bill of the ancestor of the plaintiff was dismissed with costs, and the ancestors of the defendants were declared

entitled to the possession of the bog in question (*inter alia*); that the deed, upon the construction of which the present action was brought, was made in pursuance of that decree, and in the exact terms of the deed of 1791; that the judgments and decrees in the former action and suits were still in force, and that by them the very questions raised by the first paragraph of the summons and plaint had been decided.—*Demurrer thereto allowed*, upon the ground that the dismissal of a bill, seeking equitable relief in respect of an instrument on which a party can sue at law, is no bar to an action at law upon the same instrument, although the decree do not state the dismissal to have been without prejudice.

*Held*, that there is no repugnancy between a grant of "bog" and a reservation of "turbary," as turves are not the sole profit of bog. And that "turbary," not being the soil, but only a profit *a appendre*, is not within the 3 & 4 W. 4, c. 27. *E. Beere v. Fleming* 506

2. In an action of trespass to land, the plea of *liberum tenementum* will not, as a general rule, be allowed, and, if pleaded, will be set aside. *E. Pendergast v. Lord Plunket* 98

#### TRIAL OF QUALITY, REASONABLE TIME FOR.

*See* CONTRACT, 1.

#### TROVER.

*See* EXECUTOR DE SON TORT.

TRESPASS TO REAL PROPERTY, 1.

#### TURBARY.

*See* TRESPASS, 1.

A demised to B lands, then in the possession of B, as tenant to A; *habendum*, "with the rights, members, and appurtenances thereunto belonging, or in anywise appertaining," to B and his representatives. Before the date

of this lease, B had been accustomed to cut turf for the use of his family, on a bog which belonged to A, and adjoined the demised lands.—*Held*, that the lease continued to B, and his representatives, the right of cutting turf for domestic use.

*Held*, that the term "appurtenances," when used in a lease, is flexible, and must be interpreted so as to carry out the intention of the parties. *Q. B. Dobbyn v. Somers* 293

#### TRESPASS TO PERSON.

*See* ASSAULT, JUSTIFICATION OF.

#### UNCERTAINTY.

*See* DEVISE.

#### WEIGHMASTER, DISTURBANCE OF OFFICE OF, WHAT AMOUNTS TO.

The power given to Magistrates at Quarter Sessions, by the 2nd section of the 52 G. 3, c. 134, to appoint a weighmaster of butter, is exercisable by them since, as well as before, the 1st of March 1813.

The plaintiff, a candidate for the office of weighmaster, obtained, for the sum of £5, a surrender of the office from the then holder, who was advanced in life, and had ceased to discharge the duties. The Justices at Quarter Sessions acted on this, and appointed the plaintiff.

The appointment of the plaintiff was put in issue at the trial—

*Held*, that the Judge was not bound to nonsuit the plaintiff, or direct a verdict for the defendant, under the 11th section of the 52 G. 3, c. 134.

It is not a condition of the validity of the appointment that the oath and bond, mentioned in the 6th section of the 52 G. 3, c. 134, should be taken and perfected at the same Sessions at which the appointment is made.

## WEIGHMASTER.

The opening, by the defendant, of a weigh-house near that of the plaintiff, and the weighing of butter there for the public, at like fees as those prescribed by the statute to be taken by the plaintiff, and the holding out of inducements to the public to resort to such weigh-house (such acts resulting in a loss of profit to the plaintiff), amount to a disturbance of the plaintiff in his office of weighmaster of butter, under the 52 G. 3, c. 134, though the defendant may not have "assumed" the office of the plaintiff "as such," nor done acts which the plaintiff was exclusively privileged to do under the statute; and though the defendant's acts were not in themselves deceitful, wrongful or violent.

The damages in such an action are not limited to the amount of actual loss of profits sustained by plaintiff.

The town of Tipperary is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61.

The 6th section of the 52 G. 3, c. 134, enacts that every weighmaster, before he enters on the execution of his office, "shall take and subscribe before, &c., the oath following."

In the form of oath given by the statute, the weighmaster is to swear to the faithful performance of his duties "during the time I shall continue in said office." In the oath actually taken by the plaintiff, which in other respects literally followed the form, the words were "during the time I shall hold said office."

*Held*, that the form was sufficiently complied with: *per* PIGOT, C. B., and HUGHES, B.

## WRIT OF REVIVOR. 593

But *Held*, *per* FITZGERALD and DEASY, BB., that the words "continue in" were part of the oath, and that their omission was fatal. *E. Dexter v. Cust* 97

## WILL.

*See* DEVISE.

The lessee of lands *pur autre vie*, by his will, made in the year 1832, devised "half of his lands to his son A."—*Held*, that under that devise, whether the lands were held in fee or *pur autre vie*, A took an estate for life only.—Classification of the cases upon devises similar to the above.

The *habendum* of a deed, although void, may be looked at, together with the other parts of the deed, to qualify the estate granted by the premises. *E. Hagarty v. Nally* 532

## WORDS ACTIONABLE PER SE.

*See* SLANDER, 1.

## WORDS RELATING TO EMPLOYMENT OF A DOMESTIC SERVANT.

*See* SLANDER, 1.

## WRIT OF REVIVOR.

Plea to writ of revivor praying execution generally that the plaintiff, after the recovery of the judgment mentioned in the writ, had issued a *ca. sa.* on foot of it, upon which the defendant had been arrested and detained in custody until discharged under an order from the plaintiff.—*Held* upon authority of *Burns v. O'Leary* (3 Ir. Com. Law Rep. 1), that this plea disclosed no answer to plaintiff's writ. *E. Doolan v. Doolan* 27

# INDEX TO APPENDIX.

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## BILL OF EXCEPTIONS.

See PRACTICE, 6.

## BILL OF EXCHANGE.

See PRACTICE, 2.

## COMMISSION TO EXAMINE WITNESSES IN ENGLAND.

It is no answer to an application for a commission to examine witnesses in London, that an action with the same object is pending in England.

The granting of a commission to examine witnesses is a matter *ex debito justitiæ*. E. *Bartlett v. Lewis* xxxix

## COSTS.

See PRACTICE, 2, 6.

RESIDENCE, MEANING OF.

In an action of contract, both parties to which resided within the same civil-bill jurisdiction, and which was brought to recover five and one-half years' arrears of salary, the plaintiff obtained £8 by verdict, besides £45 which the defendant lodged in Court, under a plea of tender, before action commenced, but did not apply to the Judge who tried the case for a certificate that it was a case fit to be tried in a Superior Court. The Taxing-master, accordingly, refused to tax the plaintiff's costs upon the higher scale. Upon appeal, that ruling was reversed by the Court (FITZGERALD, J., dissenting). Q. B. *O'Rorke v. McDonnell* viii

## COSTS NOT GIVEN UPON AMENDMENT OF A DEFENCE READ TO AND PLEADED BY LEAVE OF THE COURT.

See GENERAL ORDER (34th 1854).

## COSTS, SECURITY FOR.

See PRACTICE, 3.

A defendant does not save his right to security for costs, by serving notice of motion for that purpose, if pending the motion he files a defence and omits to serve with it a notice that it is filed without prejudice to the pending motion. E. *Beausang v. Condon* xxxvii

## COUNT, FORM OF COMMENCEMENT OF.

See GENERAL ORDERS (34th 1854).

## DEFENCE.

See EJECTMENT.

GENERAL ORDER (34th 1854).

LIBEL.

PRACTICE, 4.

## EJECTMENT FOR NON-PAYMENT OF RENT.

Ejectment for non-payment of rent, claiming six years' arrears. Plea: "That the rent of the said premises is not in arrear; and that the defendant discharged the said rent, and every part thereof, to the said plaintiff, before the commencement of the action."—*Held*, a bad plea, because it did not go on to show *how* the rent had been discharged. Q. B. *Hughes v. Browne* v

## EJECTMENT, &c.

### EJECTMENT ON THE TITLE.

See PRACTICE, 3.

### EMBARRASSING PLEA.

See EJECTMENT.

### EXCEPTIONS, BILL OF.

See PRACTICE, 6.

### EXCHANGE, BILL OF.

See PRACTICE, 2.

### GARNISHEE ORDER.

See PRACTICE, 5.

### GENERAL ORDER (34th, 1854).

The concluding sentence of the 34th General Order 1854 applies to Counsel as well as to attorneys. When, in a summons and plaint, the money counts did not commence in a new paragraph, the plaintiff was ordered to amend the summons and plaint on the file at his own cost. The Court will not impose costs upon a defendant ordered to amend a defence, read to and pleaded by leave of the Court.

*Per* DEASY, B.—Counsel ought to number each paragraph when drawing pleadings. *E. McAnulty v. Nantes* xi

### JUDGMENT MORTGAGE.

See PRACTICE, 5.

### LANDLORD AND TENANT ACT.

See PRACTICE, 3.

### LAPSE OF TIME.

See MOTION TO COMPEL PLAINTIFF TO PROCEED.

### LIBEL.

In an action of libel, a defence that the alleged libel was a fair comment in a newspaper upon the plaintiff's acts, must allege that the article was a fair

## NON-COMPLIANCE, &c. 595

comment upon the plaintiff's conduct on the occasion therein referred to.

The plea in *The Earl of Lucan v. Smith* (26 Law Jour., Exch., 94, note 2), *Bullen and Leake's Prec. in Pleading*, 2nd ed., p. 614, disapproved of.

The introduction of untraversable averments into the summons and plaint, such as laudatory statements relative to the plaintiff, is a very objectionable practice, and tends to mislead juries from the real questions in dispute. *E. Clinton v. Henderson* xliii

### MOTION TO COMPEL PLAINTIFF TO PROCEED.

Action on the common money counts, and on a bill of exchange, against the executor, as such, of a deceased testator. The defendant died after the plaintiff had withdrawn the notice of trial. Nearly four years after the defendant's death, his executor moved the Court to direct the plaintiff to proceed with the action, pursuant to the Common Law Procedure Act (Ireland) 1856, s. 93. Motion refused, on the ground that the action did not survive against the personal representative of the deceased defendant, within the meaning of the Common Law Procedure Act (Ireland) 1853, s. 158, and the Common Law Procedure Act (Ireland) 1856, s. 93.

*Quare*—Whether, in a case which comes within the latter section, the motion is granted *as of right*? *Q. B. Chamberlaine v. Drumgoole* i

### NEW TRIAL MOTION.

See PRACTICE, 6.

### NON-COMPLIANCE WITH THE ORDER OF THE COURT.

See SUBSTITUTION OF SERVICE.

NON-SURVIVORSHIP OF  
ACTION TO PERSONAL REPRESENTATIVE.

See MOTION TO COMPEL PLAINTIFF TO PROCEED.

PAYMENT INTO COURT,  
PARTICULARS OF.

See PRACTICE, 1.

PLEA IN *Lucan v. Smith* DIS-  
APPROVED OF.

See LIBEL.

PRACTICE.

1. To a summons and plaint, containing the common *indebitatus* counts, where the bill of particulars included twenty-eight items, amounting to £400, the defendant pleaded payment into Court of £30; and as to the residue of the demand, traversed the several paragraphs of the plaint *seriatim*.

On motion, by the plaintiff, that the defendant be required to specify the items of the bill of particulars, to which his payment into Court was applicable,—*Held*, that the case was not one in which the Court would order the defendant to give the particulars required. Q. B. *Ryan v. Horgan* xxxiv

2. Actions brought under the Summary Bills of Exchange Act (24 & 25 Vic., c. 43) are subject to the provisions of the 97th section of the Common Law Procedure Act of 1856; and if the sum recovered be less than £20, and both parties reside within the same civil-bill jurisdiction, the plaintiff will not be entitled to costs. C. P. *Copland v. Armstrong* lxvi
3. A plaintiff, in an action of ejectment on the title, brought to recover the possession of premises, where the lease has determined, is not entitled to security for costs from the defendant, under the 24 & 25 Vic., c. 154, s. 75, unless he actually produce, upon the motion, the lease or counterpart; and it is not sufficient for him to deny that a counterpart ever existed, and

to make it appear, by affidavit, that the defendant is in possession of the lease, and to require him, by notice, to produce same. C. P. *Bell v. Bell and others* xlvii

4. Where the defendant in a personal action filed his defence within the time required by the 43rd section of the Common Law Procedure Amendment Act 1853, and omitted, for some days afterwards, to serve a copy thereof; but did so before the plaintiff had given notice of a motion for liberty to mark judgment—*Held*, that, notwithstanding that the plaintiff had been prevented from marking judgment, in consequence of the filing of the defence, though without notice, that defence became regular as soon as the copy was served: and the plaintiff could not afterwards object to it. C. P. *Moore v. McElroy* xlix
5. A judgment creditor obtained a garnishee order to attach certain rents, to which the judgment debtor was alleged to be entitled. Prior to the obtaining of the absolute order for payment, the plaintiff ascertained that a judgment mortgagee had filed a cause petition, under the 15th section of the Court of Chancery (Ireland) Regulation Act 1850, against the defendant, under which an order of reference had been made for the appointment of a receiver. No notice of the motion had been served upon the mortgagee, and no one appeared to resist the making absolute of the order, nor was the Court informed of the above fact. The mortgagee subsequently, having moved to set the order aside—*Held*, that it was the duty of the plaintiff to have apprised the Court of the existence of the judgment mortgage, and proceedings thereunder; and that, without imputing *mala fides* to the plaintiff, it amounted to such a suppression of fact on his part as entitled the mortgagee to have the order set aside, with costs, without prejudice to any further application the plaintiff might be

advised to make, to have the primary garnishee order made absolute.

The plaintiff having accordingly moved *de novo* to this effect, upon notice to the mortgagee—*Held*, that the existence of a judgment mortgage affecting the defendant's lands, was, *per se*, sufficient to disentitle the plaintiff to obtain an absolute order for the payment of the rents. C. P. *Collins v. Thompson* li

6. Where a party tenders a bill of exceptions, and furnishes a draft of same for settlement, the Court will not afterwards grant him a conditional order for a new trial, for misdirection, unless he waive the bill of exceptions.

Where the Court improvidently granted such a conditional order, without requiring the party to abandon the bill of exceptions, upon his subsequent refusal to do so, they discharged the order, with costs.

Where such an order has been granted, the proper course for the other party to adopt is, to move to set it aside, and not to show cause against it, in the ordinary way. C. P. *Bloomfield v. Johnson and another* lvii

#### PROCEDURE ACT.

*See* COSTS.

"RESIDENCE, MEANING OF, IN PROCEDURE ACT 1853. PRACTICE, 4.

"RECOVER," MEANING OF.

*See* COSTS.

"RESIDENCE," MEANING OF, IN THE 9TH SECTION OF PROCEDURE ACT 1853.

The house in which a person always

sleeps, and not the house in the same city to which his letters are directed, and at which he transacts his business, is his "residence," within the meaning of the 9th section of the Common Law Procedure Act 1853.

A plaintiff, resident in Ireland at the time that an action is commenced, will not be compelled to give security for costs; but he will not get the cost of a motion to compel him to do so, if he has mis-stated his residence in the summons and plaint. E. *Tom v. Nagle* xxxviii

#### SECURITY FOR COSTS.

*See* PRACTICE, 3.

#### SUBSTITUTION OF SERVICE.

The Court will not dispense with the 133rd General Order, unless the non-compliance with it was caused by a "fatality." Q. B. *May v. May* xxxvi

#### TIME FOR FILING DEFENCE.

*See* PRACTICE, 4.

#### UNTRAVERSABLE AVERMENTS CONDEMNED.

*See* LIBEL.

#### VENUE, MOTION TO CHANGE.

Where two of three defendants had taken defence, the third being out of the jurisdiction, the Court refused, with costs, a motion to change the venue, made by the defendants, who had taken defence, upon the ground that the motion was premature, the cause not being at issue. E. *Corah v. Ward* xlii















